TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 550

EARL MOORE, PETITIONER,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1940.

CERTIORARI GRANTED DECEMBER 16, 1940.

BLANK PAGE

INDEX

	PAGE
Caption	1
Proceedings in State Court:	
Declaration	1
Exhibit "A"—Schedule of Wages and Rules Governing Yardmen and Switchtenders, effective April 1, 1924	4
Exhibit "B"—Seniority List of Yard Men, Jackson, Mississippi, November 13, 1926	18
Summons issued 9/15/36 and Sheriff's Return thereon (Omitted)	19
Interrogatories Propounded to Non-Resident Defendant	20
Answers of Non-Resident Defendant to Interrogatories	21
General Issue Plea of Defendant	22
Special Pleas Nos. 1 to 4 Inclusive of Defendant	23-28
Exhibit "A"—Letter, Earl Moore to J. F. Walker, dated 2/17/33	29
Special Plea No. 5 of Defendant	29
Exhibit "A"—Judgment in case Earl Moore vs. Yazoo & Miss. Valley Railroad Co., et al., Miss. State Court, No. 8232	34
Demurrer of pltf. to Special Pleas of Defendant	35
Demurrer of pltf. to Special Plea No. 6 of Defendant	38
Special Plea No. 6 of Defendant	39

INDEX—Continued

	PAGE
Plaintiff's Replication to Defendant's Fifth Special Plea	40
Exhibit "A"—Declaration in case Earl Moore vs. Yazoo & Miss. Valley Railroad Co., Miss. State Court	42
Exhibit "B"—Opinion of the Court in case Earl Moore vs. Yazoo & Miss. Valley Railroad Co., Miss. State Court	47
Exhibit "C"—Opinion of Supreme Court of Miss. in case Earl Moore vs. Yazoo & Miss. Valley Railroad Company	48
Demurrer of defendant to Plaintiff's Replication to Deft. Fifth Special Plea	53
Judgment, entered 2/22/37	53
Appeal Bond	55
Agreement permitting pltf. to amend declaration by increasing demands of pltf. from $3,000.00 to $12,000.00, etc.	56
Notice of Removal (Omitted)	57
Petition for Removal (Omitted)	57
Bond for Removal (Omitted)	57
Order of Removal	57
Clerk's Certificate, State Court (Omitted)	58
Proceedings in U. S. District Court:	
Petition of defendant to withdraw Pleas and file Plea in Abatement	58
Defendant's Plea in Abatement	60
Plaintiff's Demurrer to Defendant's Plea in Abatement	63
Order permitting deft. to withdraw Pleas, allowing filing Plea in Abatement, sustaining demurrer to Plea in Abatement	64

INDEX—Continued

	PAGE
Special Pleas Nos. 1 to 4 inclusive of Defendant	65-70
Notation as to Exhibit "A"—Letter, Earl Moore to J. F. Walker, dated 2/17/33	71
Special Plea No. 5 of Defendant	71
Notation as to Exhibit "A"—Judgment in case Earl Moore vs. Yazoo & Miss. Valley Railroad Co., et al., Miss. State Court, No. 8232	75
Special Plea No. 6 of Defendant	75
Special Plea No. 7 of Defendant	76
Demurrer of Plaintiffs to Special Pleas Nos. 1 to 4 inclusive, of defendant	77
Plaintiff's Replication to Defendant's Fifth Special Plea	80
Notation as to Exhibit "A"—Declaration in case Earl Moore vs. Yazoo & Miss. Valley RR. Co., Miss. State Court	83
Notation as to Exhibit "B"—Opinion of the Court in case Earl Moore vs. Yazoo & Miss. Valley RR. Co., Miss. State Court	83
Notation as to Exhibit "C"—Opinion of Supreme Court of Miss. in case Earl Moore vs. Yazoo & Miss. Valley RR. Co.	83
Demurrer of plaintiff to Special Plea No. 6 of Defendant	83
Demurrer of plaintiff to Special Plea No. 7 of Defendant	84
Motion of Plaintiff for Judgment	85
Order sustaining demurrers pltf., demurrers to deft.'s 1st, 2nd, 3rd, 4th and 6th and 7th Special Pleas and overruling defendant's demurrer to Pltf.'s Replication to 5th Special Plea	86

INDEX—Continued

PAGE

Opinion of the Court, dated 8/16/38 87
Opinion of the Court, dated 10/3/38 90

Amendment to Paragraph 6 of Declaration by Agreement with defendant 95
Exhibit "C"—Letter, J. F. Walker to Earl Moore, dated 2/15/33 96

Motion of Pltf. to Amended Declaration 97
Order allowing Pltf. to Amend Declaration 97
Answer of Defendant to Declaration 98

TRANSCRIPT OF EVIDENCE 102
Case called for Trial, etc. 102

Evidence for Plaintiff:
Testimony of Earl Moore 102
Exhibit "A"—Page 117 of the Supreme Court Record in the case of Earl Moore vs. I. C. RR. Co. 104
Notation relative to Exhibit "B" 106
Exhibit "C"—Page 155 of the Supreme Court record in case Earl Moore vs. I. C. RR. Co. 108
Notation relative to Exhibits in Proceedings in State Court case, etc. 109
Notation relative to Exhibit "E"—Being Letter J. F. Walker to Earl Moore, dated 2/15/33 (Same as Exhibit "C") 115
Exhibit "F"—Hearing given Mr. Earl Moore in Trainmaster's Office, Jackson, Miss., Feb. 20, '33, etc. 115

INDEX—Continued

PAGE

Transcript of Testimony—(Continued):
Evidence for Plaintiff—(Continued):
Testimony of Earl Moore—(Continued):
Exhibit "G"—Paragraph from Section 3 of the lease between the Y. & M. V. and A. & F. Railroad Company 118
Exhibit "H"—Introduction of Illinois Central RR. System of Transportation Rules 119
Exhibit "I"—Introduction of Answers to Interrogatories propounded to the RR. Co., etc. 120
Exhibit "J"—Statement of the earning of H. H. Cutler employed as Switchman by I. C. RR. Co., at Jackson, Miss., Jan. 1, 1933 to Oct. 15, 1938 122
Exhibit Deft. #1—Letter, Earl Moore to T. K. Williams, Trainmaster, dated 9/7/32 130
Exhibit (not marked)—Letter, J. F. Walker, Supt., to Earl Moore, dated 2/20/32 135

Testimony of A. E. McGhee 136

Motion of defendant to exclude evidence offered by pltf. and for Judgment, Ruling Reserved 140

Evidence for Defendant:
Testimony of T. K. Williams 141
G. G. Dowdall 153
F. A. Tyson 155

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):
Evidence for Defendant—(Continued):
Testimony of F. A. Tyson—(Continued):
Exhibit Deft. "A"—Statement of Earnings of Earl Moore employed as Switchman by I. C. RR. Co., at Jackson, Miss., Nov. 11, 1926 to Dec. 31, 1932, Incl. 157
Notation as to Exhibit "B" being Statement of the earnings of H. H. Cutler, etc., (Same as Exhibit "J") .. 158
Exhibit "C"—Statement of earnings of H. H. Cutler, employed as Switchman by I. C. RR. Co., Jackson, Miss., Nov. 11, 1926 to Dec. 31, 1932, inc. 159

Testimony of T. S. Jackson 160
S. Hester 173
J. R. Foreman 176
C. E. Morphis 180
T. S. Jackson 184
L. E. Howard 184

Evidence for Plaintiff (In Rebuttal):
Testimony of E. A. Fleming 188
John Masters 190
J. A. Varnado 191
A. E. McGhee (Recalled) 195

Renewed Motion of defendant at the close of all the evidence for a directed verdict and ruling reserved 196
Motion of plaintiff at the close of all the evidence for a directed verdict and ruling reserved 196

INDEX—Continued

	PAGE
Opinion of the Court, dated 2/20/39	196
Judgment dated 3/7/39	200
Findings of Fact and Conclusions of Law	201
Motion of pltf. to set aside Judgment as to damages and Render	205
Order overruling motion of pltf. to set aside judgment and to re-assess damages and exception thereto	206
Notice of Appeal	206
Appeal Bond	207
Cross-Appeal Papers:	
Notice on Cross-Appeal	208
Cross-Appeal Bond	209
Order extending time 40 days from 4/4/39 to file Record	210
Designation of Contents of Record on Appeal by both parties	211
Agreement of Counsel as to Parts of Record	213
Order extending time 30 days additional from 5/13/39 to file Record in C. C. A.	215
Clerk's Certificate	216
Proceedings in U. S. C. C. A., Fifth Circuit	217
Minute entry of argument and submission	217
Opinion, Sibley, J.	217
Dissenting opinion, Holmes, J.	227
Judgment	228
Petition for rehearing	230
Petition for rehearing	230
Order denying rehearing	236
Clerk's certificate	236
Order allowing certiorari	237

BLANK PAGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

PLEAS AND PROCEEDINGS had and done at the regular term of the District Court of the United States for the Jackson Division of the Southern District of Mississippi, on November 10, 1938, that being the time and place fixed by law.

Present and Presiding, the Honorable S. C. Mize, United States District Judge.

Among the proceedings had and done were the following, to-wit:

RECORD IN THE STATE COURT.

(Filed in the U. S. District Court March 21, 1938.)

In the Circuit Court of Hinds County, Mississippi.

EARL MOORE,

versus No. 9378.

ILLINOIS CENTRAL RR. CO.

DECLARATION.

Now comes Earl Moore, plaintiff herein and a resident citizen of the First District of Hinds County, Mississippi, and complains of the Illinois Central Railroad Company, a corporation chartered, organized and existing under and by virtue of the Laws of the State of Illinois but doing business and having officers and agents within said district, county and state upon whom service may be had.

For that, whereas, on and for a long time prior thereto the 15th day of February, 1933, the said plaintiff was a member of a certain labor organization known as the brotherhood of Railroad Trainmen, which organization had a contract of employment with the said defendant providing for rules and rates of pay of trainmen employed by said defendant, a copy of said contract being hereto attached marked Exhibit "A" and prayed to be considered a part hereof as fully and completely as if copied herein, said contract was in effect between said organization and said defendant at all times mentioned herein.

That said plaintiff had been employed by said defendant as a trainman since on or about June 2nd, 1926.

3 That as a member of said organization said plaintiff was entitled to all of the benefits of said contract between said organization and said defendant.

That on the 13th day of November, 1936, in accordance with the provisions of said contract, the said defendant published its seniority roster for its Jackson yards and said plaintiff was assigned on said roster Number 52, a copy of said seniority roster being hereto attached marked Exhibit "B" and prayed to be considered a part hereof as fully and completely as if copied herein.

That among other things and as the main provision of said contract between said organization and said defendant, said contract provides for seniority of services; that is to say that any person holding a number should be entitled to work, if work was available, before any person holding a higher or succeeding number to such person and said plaintiff was entitled to work under said contract of employment whenever work was available for fifty-two men in the said Jackson yards, and said con-

tract provides, among other things, that no person should be fired or discharged without just cause.

That from the date that said plaintiff had entered the employment of said defendant as a trainman in the Jackson yards, the said plaintiff had rendered faithful and efficient services to said defendant and had been, and was, at all times mentioned herein, except when the said plaintiff was sick, ready, willing and able to comply with all rules, regulations and contracts of said defend-
4 ant.

That on or about February 15th, 1933, and without cause, the said defendant did arbitrarily discharge from its employment said plaintiff, and, although said plaintiff has diligently sought employment since said time, he has been unable to obtain employment.

That under and by virtue of the provisions of said contract, the minimum pay per day was $6.64 and if said plaintiff had not been discharged the said plaintiff would have worked a sufficient number of days as Number 52 on the original roster of November 13th, 1926, as amended by succeeding rosters, so that plaintiff would have earned the sum of $12,000.00, but because of the breach of said contract of employment and the arbitrary discharge of said plaintiff by said defendants, as aforesaid, said plaintiff has earned nothing.

To the damage of said plaintiff in the sum of $12,000.00, wherefore he brings this, his action, and demands judgment against said defendant in the sum of $12,000.00, together with interest and costs.

CHALMERS POTTER,
Attorney for Plaintiff.

5 EXHIBIT "A".

Filed October 20, 1938.

Illinois Central Railroad Company.
Office of General Manager.

Schedule of Wages and Rules Governing Yardmen and Switchtenders.

Effective April 1, 1924.

Article 1.

Rates of Pay.

		Per Day.	Overtime Per Hour.
A.	Foremen	$6.64	$1.24½
	Helpers	6.16	1.15½
	Switchtenders	4.72	.88½

B. Pilots will receive not less than Foreman's pay, rate to apply for the entire day's work.

Article 2.

Basic Day and Overtime.

(A) Eight hours or less shall constitute a day's work.

(B) Except when charging off where it is the practice to work alternately days and nights for certain
6 periods, working through two shifts to change off; or where exercising seniority rights from one assignment to another; or when extra men are required by schedule rules to be used, all time worked in excess

of eight hours continuous service within a 24-hour period, shall be paid for as overtime, on the minute basis, at one and one-half times the hourly rate. This rule applies only to service paid on an hourly or daily basis and not to service paid on mileage or road basis.

Article 3.

Defining Yard Work.

(A) The switching, the transfer of freight and passenger equipment, the handling of all construction and maintenance of way trains operating exclusively within the switching limits, shall be considered yard work and be handled by yard men at not less than yard rates.

(B) Where regularly assigned to perform service within switching limits, yard men shall not be used in road service when road crews are available, except in case of emergency. When yard crews are used in road service under conditions just referred to, they shall be paid miles or hours, whichever is the greater, with a minimum of one hour, for the class of service performed, in addition to the regular yard pay and without any deduction therefrom for the time consumed in said service. This, however, not to affect practice of pushing trains, or the handling of miners' and other work now regarded as incidental to yard work at Kankakee, Evansville, Mounds, East St. Louis, Belleville, Duquoin, Herrin, Christopher, Benton, LaSalle, Amboy, Dixon, Rockford, Dubuque, Fort Dodge, Cherokee, Henderson, Grenada, Canton and Brookhaven.

Article 4.

Pay to Starting Point. Reporting and Not Used. Assigned to Other Duties.

(A) Pay of yardmen shall continue until they return to the point at which they started to work.

Where hardships are caused by this rule in any yard or terminal, the Division Officers and Local Chairman shall negotiate an equitable rule to afford relief, subject to the approval of General Manager and General Chairman.

(B) Yardmen reporting for duty after being called, and not performing service, will be paid one day. This will not affect the present practice of requiring extra men to report morning and evening to find if work is available.

(C) Yardmen assigned to other than their regular duties will be paid the established rate for service performed, but in no case shall a yardman so assigned be paid less than on the basis of their regular rates.

Article 5.

8 Lunch Period.

(A) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work, without deduction in pay.

(B) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

(C) Paragraphs (A) and (B) of this article apply to switchtenders, but switchtenders will be held responsible for their regular duties during the lunch period.

Article 6.

Starting Time.

(A) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours' advance notice.

(B) Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between 6:30 A. M. and 8:00 A. M.; the second shift 2:30 P. M. and 4:00 P. M.; and the third shift, 10:30 P. M. and 12:00 midnight.

(C) Where two shifts are worked in continuous service the first shift may be started during any one of periods named in Section (B).

(D) Where two shifts are worked not in continuous service the time for the first shift to begin work will be betweeen the hours of 6:30 A. M. and 10:00 A. M. and the second shift not later than 10:30 P. M.

9 (E) Where an independent assignment is worked regularly the starting time will be during one of the periods provided in Sections (B) or (D).

(F) At points where only one yard crew is regularly employed, they can be started at any time, subject to Section (A).

(G) Yardmen shall be assigned for a fixed period of time which shall be for the same hours daily for all regular members of the crew. So far as practicable, assignments shall be restricted to eight hours' work.

(H) The time for fixing the beginning of assignments or meal periods is to be calculated from the time fixed for the crew to begin work as a unit without regard to preparatory time or individual duties.

(I) Exceptions to the starting time rules may be agreed upon locally to cover local service requirements, subject to approval of General Manager and General Chairman.

Article 7.

Consist of Crew.

(A) A yard crew shall consist of not less than one foreman and two helpers, and yardmen will not be required to work with less than a full crew as specified above, except where a lesser number of men are now employed.

(B) In yards where three helpers are now employed on yard engines the practice will be continued and the number of men on crews will not be reduced except by agreement between the Company and the yardmen's committee.

Article 8.

Working Sixteen Hours.

Yardmen required to work sixteen hours will resume work when their rest period is up under the law and their pay will begin at their regular established starting time.

Article 9.

Vacancies.

When vacancies occur and senior yardmen are left unplaced through no fault of their own, they will receive pay for a minimum day.

Article 10.

Attending Court, Investigations, Etc.

(A) Yardmen or switchtenders attending Court or inquests under instructions from the Company will be al-

lowed the same compensation they would have earned had they remained on their regular assignment, with necessary expenses. Extra men so used will be allowed a minimum day, with necessary expenses. Money so earned shall be paid not later than the next regular pay-day.

11 (B) Yardmen or switchtenders held to testify at inquests, make statements to Claim Agents, or give depositions on their own time at the instance of the Company will be paid for all time lost at regular rates. If no time is lost they will be paid for all time consumed at their regular hourly rates.

(C) Yardmen or switchtenders required to be present at investigations other than those in which they are concerned, will be paid for all time lost and necessary expenses.

(D) Yardmen or switchtenders required to attend re-examinations on rules and regulations will be afforded an opportunity to take same without loss of work.

Article 11.

Seniority.

(A) Seniority rights of yardmen will date from the time they enter service continuous in yard or terminal where employed.

(B) The right to preference of work and promotion will be governed by seniority in the service. The yardman oldest in the service will be given preference, if competent.

(C) In the appointment of Yardmasters and Assistant Yardmasters the senior yardman will in all cases, be given full and unprejudiced consideration.

(D) Rights contained in this agreement shall be understood to apply for both white and colored employes alike, and this plainly and necessarily involves only one seniority list in which all men will be treated uniformly, regardless of race or color.

12 (E) All men entering the service on and after January 16, 1920, to fill the positions of switchmen will be subject to and required to pass uniform examinations and comply with regulations as to standard watches and to know how to read and write.

(F) Discipline will be applied uniformly, commensurate with the facts in the case; without distinction as to color.

(G) When yard forces are reduced, the men involved will be displaced in the order of their seniority regardless of color.

(H) Seniority rights of switchtenders will date from the time they enter the service continuous in yards or terminal where employed.

(I) The right to preference of work will be governed by seniority in service. The switchtender oldest in service will be given preference providing the applicant is competent.

Article 12.

Seniority Lists and Bulletins.

(A) A correct seniority list of yardman and switchtenders shall be furnished Local Chairmen every ninety days, and a copy shall be posted in a convenient place in yard office to which yardmen and switchtenders shall have access at all times. A list shall also, each thirty

days, be given the Local Chairman showing all names removed from the seniority list and the reason for such removal.

(B) A bulletin shall be kept in each yard office or convenient place upon which assigned crews, switch-
13 tenders and extra men shall be registered.

Article 13.

Employment.

(A) Application of yardmen and switchtenders for employment, if not satisfactory, will be rejected within thirty days after first service, or applicant will be considered accepted.

(B) All physical examinations of applicants shall be made without expense to the persons examined, unless he shall pass such examination and be continued in the service not less than thirty days. The entire fee for such examination shall not exceed one dollar. The applicant shall be notified within ten days of the result of his physical examination, and if not notified, he will be considered physically qualified.

Article 14.

Leaving Service—Leave of Absence.

(A) Yardmen or switchtenders leaving the service of the Company of their own accord forfeit all seniority rights and shall not be reinstated.

(B) Any yardman or switchtender leaving the employ of the Company, will, at his request, be given a letter by his Division or Terminal Superintendent stating his term of service and capacities in which employed.

(C) Yardmen or switchtenders will not be granted leave of absence for a longer period than ninety
14 days, except in case of sickness of himself or member of his family, or when serving on the Committee.

Article 15.

Switchtenders Vacancies.

(A) In filling vacancies in positions of switchtenders, full consideration shall be given yardmen disabled in the service of the Company, whenever such injuries are not such as to unfit them for such duties. Disabled yardmen desiring to be considered in line for such position may file application with the proper officer of the Company.

(B) The Yardman so disabled or incapacitated will date his seniority as switchtender from the date when permanently disabled or incapacitated in the terminal where employed.

Article 16.

Time Slip Corrections.

(A) When for any reason the time claimed by time slip is not allowed, or if the time slips are not made out correctly, they will be promptly returned and the reason given therefor.

(B) Yardmen or switchtenders who are short eight hours or more in their pay will, upon request, be given a voucher for the amount.

15 Article 17.

Notary Fees.

When the Company requires that official papers shall be certified by a Notary Public, or other Court Officers, it shall pay the fee assessed by such officers.

Article 18.

Serving on Committee.

Any yardman or switchtender serving on the Committee shall not be discriminated against, and shall have leave of absence, upon request, to serve on such Committee.

Article 19.

Cabooses.

Yardmen will be furnished cabooses in transfer service, also on other extended runs justifying having cabooses. A yard crew shall be permitted to switch the caboose required by this rule to the rear end of the train before commencing a transfer or other extended movement. Cabooses will be equipped with stoves, tools, signal appliances, lamps, and such other supplies as are required for the service. Present practice of drawing supplies to continue.

Article 20.

Equipment of Engines.

(A) All engines assigned to switching service shall be equipped with headlights, foot-boards and proper
16 safety appliances at both ends.

(B) Engines that blow steam, so as to obstruct the observation of signals, shall not be used in yard service.

Article 21.

Chaining Cars, Etc.

(A) Yardmen will not be required to chain up or unchain cars, couple or uncouple hose in yards or on repair tracks where car men are on duty.

Note—Under this rule yardmen will, if necessary to avoid delay, couple or uncouple hose between engine and car.

(B) It will not be the duty of yardmen on work train to handle cables, sideboards, side doors, or to operate weed burners, rail loaders, lidgerwoods or spreaders.

Article 22.

Investigations.

(A) When objections or charges are made against any yardman or switchtender by other yardmen or switchtenders, they shall be put in writing and shall convey a full and clear statement of objections or charges.

(B) The proper officers of the Company will hear any reasonable complaint by an individual yardman or switchtender, or any complaint made by the authorized committee of the B. of R. T., representing same, provided due notice shall be given the Company in writing of
17 the subject of complaint and a special appointment made as to the time and place same shall be considered.

(C) Yardmen or switchtenders continued in the service and not censured pending an investigation of an alleged offense shall be notified, within five days after the Company has information of the offense, that a charge is pending. Within five days thereafter an investigation shall be held, if demanded, and a decision shall be rendered within three days after the investigation.

(D) Yardmen or switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or switchtenders shall have the right to be present and to have an employe of their choice at hearings and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost.

(E) Yardmen or switchtenders not at fault, required by the Company to be present at investigations as
18 witnesses, shall be paid for all time lost.

Article 23.

Experienced Yardmen.

In the employment of yardmen, experienced men shall be given preference.

Article 24.

Grievances.

Any controversy arising as to the application of the rules herein agreed upon to the schedule between officers and yardmen and switchtenders shall be taken up by the Local Committee and the Local Officials. In the event of failure on their part to agree on a satisfactory basis of settlement, the committee representing the yardmen or switchtenders may take an appeal to the General Committee of the B. of R. T., who may appeal to the General Manager of the Company.

Article 25.

Local Agreements and Term of Agreement.

(A) Nothing in these rules shall be construed to abrogate any local rights the men may now have.

(b) The rules and rates shall remain in effect until December 31, 1925, and thereafter until revised or abrogated of which intention thirty days' written notice shall be given.

J. J. PELLEY,
General Manager.

19

Accepted for the Brotherhood of Railroad Trainmen:
T. S. JACKSON,
General Chairman,
F. W. STOCKWELL,
General Secretary.

(Above constitutes pages 32-41, inclusive, of Schedule of Rules and Rates of Pay for Trainmen, it being agreed by Counsel that these pages, together with pages 58 and

59 thereof, is all of said Exhibit that should be copied herein.)

Pages 58 and 59:

21 Record System of Discipline.

A reprimand or demerit will not be noted against an employe's record without written notice to him.

Not less than five demerits will be assessed, and in multiples of five, but in no case to exceed thirty demerits for any one offense.

Reprimands and demerits placed against the record of an employe will be canceled by satisfactory service for various periods as follows:

(a) A reprimand will be canceled by a clear record of three months.

(b) Five demerits will be canceled by a clear record of six months.

(c) Ten demerits will be canceled by a clear record of nine months.

(d) Thirty demerits will be canceled by a clear record of one year.

(e) Sixty demerits will be canceled by a clear record of eighteen months.

An accumulation of ninety (90) demerits will be taken as evidence that the employe is not rendering satisfactory service, and suspension from duty will follow, at which time the entire record will be reviewed and such further action taken as the circumstances warrant.

23 EXHIBIT "B".

Earl Moore,
vs.
Illinois Central Railroad Company.

Seniority List of Yard Men,
Jackson, Mississippi.

November 13, 1926.

1.	J. E. Masters	1/ 1/02
2.	W. C. Agnew	11/ 7/05
3.	Aaron Fields, Col.	1/ 8/06
4.	A. E. Flemming	16/15/06
5.	John Tobiac, Col.	12/ 1/06
6.	I. A. Thomson	2/ 6/09
7.	S. Hester	8/11/09
8.	S. U. Thompson, Col.	9/28/10
9.	Earl Peters, Col.	10/23/10
10.	Simon Sevens, Col.	2/12/12
11.	J. B. Johnson	5/12/12
12.	J. R. Cox	8/19/12
13.	M. Berbervich	9/13/12
14.	L. B. Hill	10/12/12
15.	O. P. Miller	11/25/12
16.	Dorsey Yucas, Col.	12/25/12
17.	Theodore Johnson, Col.	12/27/12
18.	J. R. Foreman	5/14/13
19.	S. P. Dow	11/26/13
24 20.	Will Lowe, Col.	8/18/14
21.	S. E. Doolittle	8/ 1/15
22.	John Reed, Col.	1/16/17
23.	R. E. Lee	1/21/17
24.	R. W. McElwee	4/23/17
25.	H. T. Burge	5/10/17
26.	J. G. Hampton	5/11/17

27.	J. A. Varnado	6/ 5/17
28.	R. N. Steele	6/24/17
29.	Bob Harvey, Col.	6/30/17
30.	S. Odom	7/ 4/17
31.	R. B. Moore	7/ 5/17
32.	L. S. Lee	7/11/17
33.	Floyd Gardner	7/17/17
34.	Arthur Mallet, Col.	8/ 1/17
35.	B. F. Hardy	8/27/22
36.	H. B. Hardy	9/12/22
37.	J. N. Cooper	9/13/22
38	J. R. Stewart	9/23/22
39.	A. B. Conley	9/23/22
40.	E. L. Foreman	9/ 4/23
41.	J. E. Pierce	2/18/24
42.	J. M. Byrd	2/19/24
43.	C. E. Morphis	4/ 5/24
44.	Tom Neely	4/26/24
45.	E. M. Dees	8/14/24
25 46.	E. R. McMurthry	8/29/24
47.	R. A. Cochran	8/20/24
48.	Robert Newtin, Col.	8/20/24
49.	C. C. Curruth	8/25/24
50.	J. T. Fairchilds	9/ 1/24
51.	C. O. Stapleton	9/ 8/24
52.	Earl Moore	9/ 9/24
53.	H. H. Cutler	9/16/24

25-a Summons issued 9/15/36 and Sheriff's Return thereon, omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * * *

26 INTERROGATORIES PROPOUNDED TO NON-RESIDENT DEFENDANT.

In the Circuit Court of the First District of Hinds County, Mississippi.

Earl Moore, Plaintiff,
vs.
Illinois Central Railroad Company, Defendant.

To the Illinois Central Railroad Company, and May & Byrd, its attorneys of record:

You are hereby notified that these interrogatories are propounded to you under and by virtue of Section 1551 of the Code of 1930 which provides that a failure on your part to answer said interrogatories within a reasonable time that the penalty therefor is that your pleas shall be stricken from the file and judgment by default rendered against you.

Interrogatory No. 1. How many days has H. H. Cutler worked as a trainman in your Jackson yard since February 15th, 1932?

Interrogatory No. 2. What has been the total compensation earned by said Cutler since February 15th, 1932, as a switchman in your Jackson yards?

Interrogatory No. 3. If the plaintiff had continued in your employment continuously from February 15th, 1932, to the present time, would not said plaintiff have
27 been entitled to work the same number of days and the same period of time that the said Cutler worked?

CHALMERS POTTER,
Attorney for Plaintiff.

28 In the Circuit Court of the First Judicial District.

Earl Moore, Plaintiff,

vs. No. 9378.

Illinois Central Railroad Company, Defendant.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, and for answer to the interrogatories propounded to it by the plaintiff in the above entitled cause, says:

Interrogatory No. 1: How many days has H. H. Cutler worked as a trainman in your Jackson Yard since February 15, 1932?

Answer: 1012 days.

Interrogatory No. 2: What has been the total compensation earned by the said Cutler since February 15, 1932, as a switchman in your Jackson yards?

Answer: $6,672.23.

Interrogatory No. 3: If the plaintiff had continued in your employment continuously from February 15, 1932, to the present time, would not said plaintiff have been entitled to work the same number of days in the same period of time that the said Cutler worked?

Answer: Yes.

ILLINOIS CENTRAL RAILROAD COMPANY,
By MAY & BYRD,
Attorneys.

29 State of Tennessee,
County of Shelby.

Before me, the undersigned authority in and for the said County and State, this day appeared F. A. Tycer, who being by me first duly sworn, says on oath that he

is an employee of the Illinois Central Railroad Company in the office of its District Accountant in Memphis, Tennessee, and that as such employee he has full knowledge of the payrolls and the time sheets of the Illinois Central Railroad Company pertaining to the operations of the Jackson, Mississippi, Yards of said railroad company, and that he knows that the said records are correct and that the answers to the above interrogatories correctly set forth the facts regarding the number of days worked in the Jackson, Mississippi, yards by H. H. Cutler, a switchman, from February 15, 1932, to September 15, 1936, inclusive, and the said answers also set forth correctly the total compensation paid to the said Cutler by the Illinois Central Railroad Company as a switchman in the Jackson, Mississippi, yards from February 15, 1932, to September 15, 1936, inclusive, and affiant further says that the answers to the foregoing interrogatories are true and correct.

F. A. TYCER.

Sworn to and subscribed before me, this the 25 day of January, 1937.

E. W. COLLINS,
Notary Public.

(Seal)

---

30 GENERAL ISSUE PLEA.

In the Circuit Court of the First District, Hinds County, Mississippi.

Earl Moore,
vs. No. 9378.
I. C. RR. Company.

Comes the defendant, Illinois Central Railroad Company, by its attorneys, and for plea to the declaration exhibited

against it in the above styled cause, say that it is not guilty of the wrongs and injuries complained of in manner and form as plaintiff hath alleged, or in any manner or form, and of this it puts itself upon the Country.

MAY & BYRD,
Attorneys for Defendant.

---

31 SPECIAL PLEA No. 1.

In the Circuit Court of the First District.

Earl Moore,
vs. No. 9378.
Illinois Central Railroad Co.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration filed against it in the above styled cause, says actio non, because it says that never at any time did any contract for hire exist between it and the plaintiff, Earl Moore, for a definite period of time, but on the contrary, this defendant says that the hiring of the said Earl Moore was a hiring at will, the same being terminable at any time at the will and pleasure of either the said Earl Moore or this defendant. And this defendant says that it never at any time employed the said Earl Moore for any definite period of time, and the said Earl Moore never at any time agreed or bound himself to perform any service for this defendant for any definite period of time, and the said contract, being indefinite as to the period for which the plaintiff was hired, is and was terminable at will, and no cause of action accrued to the said plaintiff because of his having been discharged by this defendant.

And this the defendant stands ready to verify.

MAY & BYRD,
Attorneys for Defendant.

32 SPECIAL PLEA NUMBER 2.

In the Circuit Court of the First District.

Earl Moore,
vs. No. 9378.
Illinois Central RR. Company.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea in this behalf, says actio non, because it says that the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, upon which the plaintiff bases his cause of action, is void and unenforceable because the same is unilateral, there being no agreement whatever on the part of the said plaintiff to perform any service whatever for this defendant, and this defendant says that said agreement was executed without any consideration therefor and as between the plaintiff and the defendant no independent consideration existed for the execution of said agreement, and no independent consideration moved from either of the parties to said agreement, and said contract was, therefore, without consideration and being unilateral in its terms is unenforceable by the plaintiff.

All of which the defendant stands ready to verify.

MAY & BYRD,
Attorneys for the defendant.

33 SPECIAL PLEA No. 3.

In the Circuit Court of the First District.

Earl Moore,
vs. No. 9378.
Illinois Central Railroad Co.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that unde and by virtue of the terms of the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, which said agreement is the basis for the plaintiff's said suit, the said agreement is not a contract of hiring between the Illinois Central Railroad Company and the individual employees effected thereby; but is, as it is denominated, merely a schedule of wages and rules governing yardmen and switch-tenders, and by said agreement no switchman is employed for any specific period and no switchman agrees to perform any service for said railroad company, and no switchman agrees to perform any service for any specific time, and the said agreement, therefore, furnishes no basis for recovery by the plaintiff in this cause.

And this the defendant is ready to verify.

MAY & BYRD,
Attorneys for the defendant.

34 SPECIAL PLEA No. 4.

In the Circuit Court of the First District.

Earl Moore, Plaintiff,
vs. No. 9378.
Illinois Central Railroad Company, Defendant.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, sued on in this behalf, Paragraph D of April 22 thereof provides as follows:

"(d) Yardmen or Switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or Switchtenders shall have the right to be present and to have an employee of their choice at hearing and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and my appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall
35 be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dis-

missal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost."

And this defendant avers that on the 15th day of January, 1933, the said plaintiff, Earl Moore, was notified in writing by J. F. Walker, Superintendent of the Louisiana Division of the Illinois Central Railroad Company, that his services as an employee of the Illinois Central Railroad Company were no longer desired and that his employment was at an end effective on that date, and subsequent thereto, on, to-wit, February 17, 1933, the said Earl Moore acting within the terms of said agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, Article 22 thereof addressed to Mr. J. F. Walker, Superintendent at McComb, Mississippi, a letter requesting a hearing before the said Walker, a copy of said Letter being hereto attached, marked Exhibit "A", and asked to be taken as a part hereof as fully and completely as if herein written, and defendant says that thereafter on, to-wit: February 18, 1933, the said Superintendent J. F. Walker by letter notified the said Earl Moore, Plaintiff, that an investigation in connection with his dismissal from the service on

36 February 15, 1933, would be given to the said plaintiff, Moore on Monday, February 20, 1933, at 4:00 P. M. at the office of Trainmaster Williams in Jackson, Mississippi, and in addition thereto the said Earl Moore was personally notified of the date of said hearing.

And this defendant says that thereafter on, to-wit, February 20, 1933, at 4:00 P. M. the said Earl Moore accompanied by A. E. McGehee, a representative of his own choosing, appeared at the office of the said T. K. Williams, Trainmaster at Jackson, Mississippi, and was accorded a hearing on the question of his discharge.

That thereafter on, to-wit, the 20th day of February, 1933, the said Earl Moore gave written notice to the defendant the Illinois Central Railroad Company, that he desired to appeal from the ruling of the said J. F. Walker, Division Superintendent to the General Officers of the railroad company, this defendant, and that pursuant to said notice by the said Earl Moore, T. J. Quigley, General Superintendent of the Illinois Central Railroad Company for the Southern lines of the Illinois Central Railroad Company, being those lines owned and operates by said Company south of the Ohio River, the said Quigley being a general officer of the said Illinois Central Railroad Company and one having jurisdiction of said appeal, advised the said Earl Moore, plaintiff here, in writing on March 6, 1933, fixing Monday March 13, 1933, at 9:00 A. M. at his office in the City of New Orleans as the time and place where the said Earl Moore's appeal would
37 be heard, but this defendant says that the plaintiff, Earl Moore, failed and neglected to appear at said time, of to prosecute his said appeal, and has never to this day prosecuted said appeal but has in fact abandoned the same and the time for such appeal has long since past. And this defendant says that the said Earl Moore having set in motion the machinery provided by said contract for the settlement of the question of the rightfulness or wrongfulness of his discharge, and not having prosecuted his appeal, but having abandoned the same, is now estopped to question the decision of the officers of the Company in discharging him. And this defendant says that under the agreement sued on in this case the decision of the defendant, the Illinois Central Railroad Company, and its employees, which said decision was in good faith, is final and cannot be litigated or inquired into in this proceeding.

And all of this the defendant stands ready to verify.

MAY & BYRD,

Attorneys for the Defendant.

38 EXHIBIT "A".

(Copy.)

Jackson, Miss., February 17, 1933.

Mr. J. F. Walker,
McComb, Miss.

Dear Sir:

Under the contract of both Switchmen's Union of North America and the Brotherhood of Railroad Trainmen I desire to object to your discharging me which you did under date of February 15, 1933, and to apply for a hearing before you. I desire to have Mr. A. E. McGee to have this hearing. I also desire to know why I was discharged as I have a right to know under both of the above mentioned contracts as well as under the rules of your Company.

Please notify me of the time and place so I can be there.

Yours very truly,

(Signed) EARL MOORE.

CP/W.

---

39 SPECIAL PLEA No. 5.

In the Circuit Court of the First District.

Earl Moore,

vs. No. 9378.

Illinois Central Railroad Co.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause,

says actio non, because it says that on the 15th day of October, 1932, the plaintiff, Earl Moore, filed a suit in the Circuit Court of the First District of Hinds County, Mississippi, the same appearing on docket No. 8232, against the Yazoo and Mississippi Valley Railroad Company. By his said suit the said plaintiff alleged among other things that by reason of his having been denied his proper place on the seniority roster promulgated by the said Yazoo and Mississippi Valley Railroad Company, and by reason thereof plaintiff alleged that he was in effect discharged by said railroad company and he claimed damages in the sum of $20,000.00.

And thereafter, on the 23rd day of February, 1933, the said Earl Moore, plaintiff, filed his amended declaration against the Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company alleging that by virtue of the fact that he had been given a lower place on the seniority roster of both of the defendants in their Jackson, Mississippi, yards he had in effect been discharged by said railroad companies, and that by reason of said erroneous place on said seniority roster and by reason of said discharge he had been damaged in the sum of $20,000.00, and defendant says that the said amended declaration which was filed on the 23rd day of February, 1933, was after the said plaintiff, Earl Moore, was discharged on February 15th, 1933, and was after any right of action which the said Earl Moore might have had on account of said discharge had accrued.

And said amended declaration further alleged that there had been a breach of the contract of hiring existing between the plaintiff, Earl Moore, and the defendant, Illinois Central Railroad Company.

And thereafter, on, to-wit, the .... day of ....., 1933, this defendant, the Illinois Central Railroad Com-

pany, filed its special plea in said cause in the following form, to-wit:

"Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration herein, says that in any event the plaintiff is not entitled to recover pay for any time after the 15th day of February, 1933, because it says that on said 15th day of February, 1933, it notified the said plaintiff, Earl Moore, in writing that his services were no longer desired and that his employment was at an end and his said employment with this defendant did end on said date and any right the said Moore might have had to work for the defendant ceased on said date.

"All of which the defendant stands ready to verify."

41 And thereafter, on, to-wit, the 9th day of May, 1933, the plaintiff, Earl Moore, filed his replication to the said special plea of this defendant, the said replication being in the following form, to-wit:

"Replication to the Defendant, Illinois Central Railroad Company's Third Special Plea.

"And now comes the plaintiff and for replication to the third special plea of the Illinois Central Railroad Company heretofore filed herein says that nothing therein contained should defeat or prevent the maintenance of the plaintiff's cause of action, because it is alleged in the declaration and in the exhibits annexed thereto, under Article 17 of said exhibit the following: 'No switchman will be discharged or suspended without just cause' and said special plea does not allege that the said defendant Illinois Central Railroad Company had any sufficient cause for firing the said plaintiff who was a switchman and the said plaintiff does hereby allege and aver that the only reason that he was fired was because he filed

this lawsuit seeking a redress of his wrongs in the defendants and plaintiff avers that the filing of a law suit to compel the Court to perform their contract is not sufficient cause within the meaning of said contract of employment.

"All of which the plaintiff is ready to verify."

And thereafter on October 1, 1935, issue was joined in short by consent to said replication of the plain-
42 tiff, Earl Moore, on said special plea.

And thereafter on, to-wit, Friday, October 4, 1935, said cause of action of the plaintiff, Earl Moore, was tried by the Circuit Court of the First Judicial District of Hinds County, Mississippi, on the amended declaration and the several pleas of the defendant, the Illinois Central Railroad Company, and on the several pleas of the defendant, the Yazoo and Mississippi Valley Railroad Company, including the special plea herein set out, and on replication to said special pleas and joinder of issue on each of said replications and testimony was adduced on the trial of said cause to support the issues, and particularly was testimony introduced on the question of the discharge of Earl Moore by the Illinois Central Railroad Company on the 15th day of February, 1933, the identical discharge which is the basis of the present law suit. And at the conclusion of the hearing judgment was rendered in favor of each of the defendants in said suit, that is to say, in favor of the Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company, as shown by the judgment of this Court found at Minute Book #22, page 426 of the minutes of this Court.

And thereafter the said plaintiff, Earl Moore, appealed from said judgment of the Circuit Court of Hinds County to the Supreme Court of the State of Mississippi, on the 16th day of March, 1936, the said judgment of the Circuit

Court of the First District of Hinds County, Mississippi, rendered in said cause, was by said Supreme Court
43 of Mississippi affirmed and said suit was finally terminated adversely to the plaintiff, Earl Moore.

That all of the foregoing pleas and proceedings herein referred to appear in the records of the Circuit Court of the First Judicial District of Hinds County, Mississippi, in cause No. 8232, Earl Moore vs. Yazoo and Mississippi Valley Railroad Co., et al, in the records and proceeding of the Supreme Court of Mississippi in case No. 32,063 Moore v. Yazoo & M. V. R. Co., et al, reported in 166 So. at page 395, reference to the pleas and proceedings in said Circuit Court and in said Supreme Court are prayed to be made as often as may be necessary on the trial of this cause.

And that this defendant says that by reason of the foregoing facts the judgment rendered by this Court in said cause No. 8232 Earl Moore v. Yazoo and Mississippi Valley Railroad Co. and Illinois Central Railroad Co., recorded in Minute Book 22, page 426 of the records of this Court, adjudicated all of the things sued for in this suit, and in which said suit the said plaintiff was the same as the plaintiff in the instant suit, and this defendant, the Illinois Central Railroad Co., was a defendant as in the instant suit, and the subject matter of the litigation was the same as the subject matter of the instant suit, and was in the same Court as is the instant case; a copy of which said judgment is hereto attached, marked Exhibit "A", and prayed to be taken as a part hereof. And this defendant says that this judgment is res adjudicata of all the matters and things sued for in this suit.

And this the defendant stands ready to verify.

MAY & BYRD,
Attorneys for Defendant.

44 EXHIBIT "A."

Copy.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Seventeenth Day, Friday, October 4, 1935.

Earl Moore

vs. 8232.

Yazoo & Mississippi Valley Railroad Company, et al.

This day this cause came on to be heard and both plaintiff and defendants being present in person and by attorneys and announced ready for trial, and came a jury of good and lawful men, to-wit: D. G. Patton and eleven others, who after hearing all of the testimony in the case and receiving the instruction of the Court retired to consider the verdict and presently returned into open Court the following verdict:

"We, the jury, find for the defendants."

It is, therefore, considered and ordered by the Court that the plaintiff, Earl Moore, take nothing by reason of his suit in this behalf, and that the defendants, Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company go hence without day.

It is further ordered that the plaintiff, Earl Moore, pay all costs in this behalf expended, for all of which let execution issue.

Minute Book No. 22, Page 426.

45 FIRST SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore, Plaintiff,
vs. No. 9378.
Illinois Central Railroad Company, Defendant.

Now comes the plaintiff, Earl Moore, and demurs to the first special plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That the contract sued on showed that it was not a contract terminable at will.

And for other causes to be assigned.

CHALMERS POTTER,
Attorney for Plaintiff.

46 DEMURRER TO SECOND SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore, Plaintiff,
vs. No. 9378.
Illinois Central Railroad Company, Defendant.

And now comes the plaintiff, Earl Moore and demurs to the second special plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That the said special plea sets forth no defense to plaintiff's cause of action.

Second: That the contract sued on shows on its face that it is a unilateral contract.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

47 DEMURRER TO THIRD SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore, Plaintiff,
vs. No. 9378.
Illinois Central Railroad Company, Defendant.

Now comes the plaintiff, Earl Moore, and demurs to the Third Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special pleas sets forth no defense to plaintiffs cause of action.

Second: That said contract shows on its face that it is a contract between the Brotherhood of Railway Trainmen of which this plaintiff was a member and under which contract he worked, and the defendant.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

48 DEMURRER TO FOURTH SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore, Plaintiff,

vs. No. 9378.

Illinois Central Railroad Company, Defendant.

Now comes the plaintiff, Earl Moore, and demurs to the Fourth Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiffs cause of action.

Second: That paragraph "D" of article 22 of said contract, quoted in said Fourth Special Plea, does not make it mandatory upon the plaintiff to demand a hearing or take an appeal, but these are only additional and permissable rights granted him under the contract, and said contract nowhere prohibits his right to sue until and unless he has exhausted the rights of appeal.

Third: That the finding of the officers of said railroad are not binding because it is contrary to public policy to allow any man or person, natural or artificial, to be a judge of his own cause.

Fourth: That if said contract should be construed as to require that plaintiff demand a hearing and take or prosecutes an appeal that the said provisions relied upon in this Plea are then contrary to public policy in that they are an effort of the said parties to oust the Courts of the land of jurisdiction granted to them by the constitutional laws of the State of Mississippi.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

---

49 DEMURRER TO SPECIAL PLEA SIXTH.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore, Plaintiff,
vs. No. 9378.
Illinois Central Railroad Company, Defendant.

Now comes the plaintiff, Earl Moore, and demurs to the Sixth Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiffs cause of action.

Second: Because nowhere in said special Plea is there any denial of any fact set forth in plaintiff's declaration and that the declaration shows that the suit is based upon a written contract exhibited with the declaration and not upon a verbal contract and there is not denial of the execution of the contract sued on.

Third: That the allegations of said plea are not responsive to the issue united in plaintiff's declaration.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

50 SPECIAL PLEA No. 6.

In the Circuit Court of the First District.

Earl Moore, Plaintiff,

vs. No. 9378.

Illinois Central Railroad Company. Defendant.

State of Mississippi,
County of Hinds.

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that there was never any written contract of employment between the plaintiff and this defendant, but that the contract of employment between plaintiff and this defendant was verbal and alleged breach of contract occurred on February 15, 1933, and on said date plaintiff's cause of action, if any he had, or has, arose on said date, and more than three years elapsed from the date of said alleged breach of contract and the date of the filing of this suit, and this defendant says that by reason thereof this said suit is barred by the statute of limitations of three years, as provided by section 2299 of the Mississippi Code of 1930.

And this the defendant is ready to verify.

MAY & BYRD,
Attorney for Defendant.

51 PLAINTIFF'S REPLICATION TO DEFENDANT'S SPECIAL PLEA.

In the Circuit Court of the First District of Hinds County, Mississippi.

Earl Moore
vs. No. 9378.
Illinois Central Railroad Co.

And now comes Earl Moore, plaintiff, and for replication to the fifth special plea heretofore filed by the defendant herein, says that although it is true that on the 15th day of October, 1932, this plaintiff filed a suit in this Court, the same being numbered 8232, against the Yazoo & Mississippi Valley Railroad Company and plaintiff says that said declaration was also filed against this defendant, but that through inadvertence the Clerk of this Court neglected to issue process against this defendant but when this matter was called to the attention of the plaintiff therein process was immediately issued against said defendant upon the original declaration, a copy of said declaration being hereto attached marked Exhibit "A" and prayed to be considered a part hereof as fully and completely as if copied herein, but plaintiff denies that on the 23rd day of February, 1933, he filed an amended declaration against the Yazoo and Mississippi Valley Railroad Company and this defendant.

It was alleged in said declaration, in said suit No. 8232, and the following allegation constituted the gist of plaintiff's action therein, that the defendants therein had breached a contract between the Switchmen's Union of North America, of which plaintiff was, at the time
52 he went to work for the Alabama & Vicksburg Railway Company, a member, in that he had been given a lower place on the seniority roster of both defend-

ants in their Jackson Yards than to the place to which he was entitled under the contract, yet, plaintiff avers that the basis of his cause of action in said cause, to-wit, No. 8232, was a breach of the contract originally entered into between the said Alabama & Vicksburg Railway Company and the Switchmen's Union of North America for a failure of this defendant and the Yazoo and Mississippi Valley Railroad Company to give him the place upon the seniority roster to which he was entitled, the contract between the Switchmen's Union of North America and the Alabama & Vicksburg Railway Company having been expressly assumed as alleged in the pleadings in said cause by the defendant therein, and all other matters alleged either in the declaration or in any subsequent pleading filed by either party thereto, did not form the basis of plaintiff's cause of action therein but went merely to show and explain the extent of damages suffered by said plaintiff, or an attempt by the defendants to limit said damages.

That the cause of action between the Illinois Central Railroad Company and this plaintiff in said cause No. 8232 is in no way identical with the cause of action here sued on because the cause of action here sued on is based not upon the Switchmen's Union contract but a contract between this defendant and the Brotherhood of Railway Trainmen. The basis of this suit is not a failure to give the plaintiff the place upon the seniority roster, to which he conceived he was entitled, but it is a suit for his wrongful discharge under a contract of hire.

Plaintiff further alleges that said plea constitutes no defense because cause No. 8232 was decided by this
53 Court and affirmed by the Supreme Court upon the grounds that the contract therein sued on provided that within thirty days after the promulgation of the seniority list, the seniority list therein sued on

having been promulgated in November, 1928, that any person not being satisfied with the number given him thereon should, within thirty days after the promulgation of said list, file a written protest; that this the plaintiff, in cause No. 8232, failed to do personally within the time required by the contract between the Switchman's Union of North America and the Alabama and Vicksburg Railway Company, and for that reason a directed verdict was rendered against said plaintiff, which was affirmed by the Supreme Court of the State of Mississippi, a copy of the opinion of the Circuit Court and the opinion of the Supreme Court both being attached hereto marked Exhibits "B" and "C", respectfully, and prayed to be considered a part hereof as fully and completely as if copied herein, and the issue here involved has never been decided upon its merits either by this Court or any other Court.

All of which the plaintiff is ready to verify.

CHALMERS POTTER,
Attorney for Plaintiff.

---

54 EXHIBIT "A."

In the Circuit Court of the First District of Hinds County, Mississippi.

Earl Moore
vs.
Yazoo & Mississippi Valley Railroad Company.

Declaration.

Now comes Earl Moore, plaintiff herein, a resident citizen of the First District of Hinds County, Mississippi, and complains of the Yazoo & Mississippi Valley Railroad

Company, a railroad corporation chartered, organized and existing under and by virtue of the laws of the State of Mississippi and whose principal place of business is in Jackson, Mississippi, and the Illinois Central Railroad Company is a corporation chartered, organized and existing under and by virtue of the State of Illinois, but with officers and agents in the First District of Hinds County, Mississippi, upon whom service of process may be had in an action of debt.

For that whereas on or prior to the time hereinafter mentioned the Illinois Central Railroad Company through stock ownership and a common set of directors and officers, owned, managed and controlled the Yazoo & Mississippi Valley Railroad Company in all of its corporate functions and affairs. That the officers of both defendants are the same, that they maintain joint passenger and freight offices and depots wherever they both operate. That defendants advertise and operate under the trade name of "Illinois Central System" and as a single
55 system. That where both roads operate they maintain joint railroad yards and common switching facilities including the yards at Jackson and employ joint passenger and freight traveling agents and said corporation constitutes a common and joint enterprise and partnership.

That on the 2nd day of November, 1920, the plaintiff herein was engaged as a switchman by a certain railroad corporation whose corporation title was Alabama & Vicksburg Railway Company, and said plaintiff from said day, up until the time of the hereinafter mentioned lease, was continuously engaged by said Alabama Railway Company as such switchman.

That during said time last above mentioned, said plaintiff was a member of a labor union formed and organized

for the promotion of better hours of service, rates of pay and working conditions for its members, said union being known as the Switchmen's Union of North America, and while said plaintiff was a member of said organization and while said plaintiff was engaged as a switchman by the Alabama & Vicksburg Railway Company, as aforesaid, the Switchmen's Union of North America for and on behalf of its members, including said plaintiff, entered into a certain contract with said Alabama & Vicksburg Railway Company concerning the rates of pay, hours of service and working conditions of all switchmen working for said Railway Corporation, including said plaintiff, a copy of said contract being attached hereto, marked Exhibit "A" and prayed to be considered as a part hereof as fully and completely as if copied herein.

That thereafter and at a time when the said plaintiff was working as a switchman for said Alabama & Vicksburg Railway Company, and at a time when said
56 contract, Exhibit "A" hereto, was in effect the Illinois Central Railroad Company, acting by and through the Yazoo and Mississippi Valley Railroad Company, leased the line of railroad of the said Alabama & Vicksburg Railway Company which ran across the State of Mississippi, its western termination at Vicksburg and the eastern termination at Meridian, Mississippi, and in the lease contract, among other things, it was agreed by the Yazoo & Mississippi Valley Railroad Company that it should be bound by all contracts then in effect with the said Alabama & Vicksburg Railway Company including the contract Exhibit "A" hereto, the pertinent parts of lease being hereto attached, marked Exhibit "B" and prayed to be considered a part hereof as fully and completely as if copied herein, but the entire contract is not copied to avoid prolixity, but same is found in the record in the Chancery Clerk's office at Jackson, Mississippi, in Deed Book 181, page 281, and made a part hereof as if copied herein.

That notwitstanding the contracts aforesaid whereby said plaintiff was entitled to seniority of service as a switchman from the date of entering employment of the Alabama & Vicksburg Railway Company, to-wit, November 2, 1920, which meant and now means, that he was entitled to work, should work be available, before any switchman entered the employment of either of the three railroads herein mentioned, after November 2, 1920, the said defendants on November 13, 1926, and at all times thereafter, deprived said plaintiff of his rights of seniority and on said last mentioned day and date did publish consolidate seniority list of all switchmen working in Jackson Yards and switching trains of the Illinois Central Railroad Company's including the line owned and operated by the Yazoo & Mississippi Valley Railroad
57 Company, and lines formerly operated by said Alabama & Vicksburg Railway Company, and instead of giving to said plaintiff the seniority to which he was entitled on said list, which seniority would have made him Number 35 on the first consolidation roster issued and published by said defendants, they gave said plaintiff on said seniority list Number 52, and dated his seniority as beginning September 9, 1924, and all employment of the plaintiff since said date has been under said consolidated roster.

That under said contract, as aforesaid, said plaintiff was entitled to work whenever any work was available before any of the men listed on seniority board beginning with B. F. Hardy, Number 35, a copy of said seniority list being attached hereto marked Exhibit "C" and prayed to be considered a part hereof as fully and completely as if copied herein.

That notwithstanding said contract, aforesaid, said defendant has continuously and habitually worked men Numbered on Exhibit "C" from 35 to 51 inclusive at a

time when said plaintiff was entitled to work, and have not worked said plaintiff, thereby breaching his contract.

That immediately upon the publication of said Exhibit "C" the said plaintiff protested to the officers of the defendant, and has continued to protest from said date down to the present time, and said officials of said defendants habitually and continuously refuse to right the wrong theretofore done said plaintiff.

But for the violation of the breach of said contract by said defendants plaintiff would have worked and was entitled to work under said contract four hundred and fifty days when he was not allowed to work by
58 said defendants by reason of the breach of the contract aforesaid, but that they took away from his seniority rights, secured and guaranteed to him by said contracts aforesaid, the plaintiff is advised, believes and charges the fact to be that by reason of the falling off in the traffic throughout the nation, which decrease of traffic plaintiff alleges will be permanent, plaintiff was in effect discharged by said railroad company because there is no prospect of plaintiff being called to work under the seniority given him by said seniority list of November 13, 1926. That said plaintiff was at all times held himself ready at all times to work, and at all times has been ready, willing and able to do and perform all things required by him of said contract.

To the damage of the said plaintiff in the sum of $20,000.00 wherefore he brings this his action and demands judgment against said defendant in the sum of $20,000.00, together with interest and costs.

CHALMERS POTTER,
Attorney for Plaintiff.

59 EXHIBIT "B".

In the Circuit Court of Hinds County, Mississippi.

Earl Moore
vs. No. 8232.
Y. & M. V. R. R. Co.

Opinion of the Court.

I am of the opinion that the Rape case does not apply here, for reason that we are dealing with a written contract between the Alabama & Vicksburg Railway Company and the Switchmen's Union of North America, in which there are mutual obligations.

It will not be necessary to decide whether the two defendants were acting as partners in respect of the matters complained of, since the motion for a directed verdict can be disposed of on other grounds.

I am of the opinion that the Switchmen's Union contract referred to was assumed by the Y. & M. V. R. R. Company. In taking this position I am to some extent adopting the theory of the plaintiff that the parties to said agreement by a long course of operation thereunder, and the use of seniority lists with reference thereto, effected a definite mutual understanding and
60 agreement. It is this same theory, on the other hand, which operates, in turn, to establish by the mutual functioning thereunder the consolidated seniority lists offered in evidence by the plaintiff as a binding working agreement between plaintiff and defendants.

The only loss sought to be proved by the plaintiff is based upon the assumption that plaintiff's proper number on the consolidated seniority list is that occupied by one Cooper, which is number 37. If plaintiff's number as shown on this list is proper, then there is no proof

of loss occasioned to him. If the plaintiff has had the right to disarrange the numerical order of the names on this list, such right would belong to every other member thereon. This would lead to unreasonable confusion, and to the displacement of those of the plaintiff, and must *no* be allowed.

Plaintiff may not be permitted to repudiate the very list which he has introduced as an exhibit to his testimony.

I, therefore, see no reason or justification for disturbing the order of seniority as shown thereon and, under such view, the motion to exclude is sustained.

61 EXHIBIT "C".

Earl Moore
vs.
Yazoo & Mississippi Valley R. R. Co.

This is an action by the appellant against the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company for the alleged breach of a contract of employment. On motion of appellees, the appellant's evidence was excluded, and the jury was directed to return a verdict for them, which was accordingly done.

The facts disclosed by the record, out of which the appellant's claimed cause of action arises, are, in substance, as follows: Prior to June, 1926, the Alabama & Vicksburg Railway Company owned and operated a railroad, one of the termini of which was the city of Jackson, Mississippi, at which place it operated a switching yard. The appellant was employed by that company as a switchman in its Jackson yard; the relation between them being determined by a contract entered into with

the company by the Switchmen's Union of North America, of which the appellant was a member. This contract provided for seniority rights of the members of the union employed thereunder, which right of seniority determined the assignment of members of the union under the contract to work for the railroad company. In June, 1926, and thereafter the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company were both operating railroads running through the city of Jackson, at which place the switching for both roads was done by the Illinois Central Railroad Company under an arrangement
62 between them by which the Yazoo & Mississippi Valley Railroad Company paid the Illinois Central Railroad Company its proportionate part of the expenses incurred by it in doing this switching. In June, 1926, the Alabama & Vicksburg Railway Company leased its railroad to the Yazoo & Mississippi Valley Railroad Company. According to the appellant, this lease contract obligated the Yazoo & Mississippi Valley Railroad Company to assume and carry out the contract of the Switchmen's Union of North America with the Alabama & Vicksburg Railway Company, and the relation between the appellees, the evidence of which it will not be necessary to set forth, imposed a similar obligation on the Illinois Central Railroad Company.

It will not be necessary for us to determine whether or not this construction of the lease and of the relations between the appellees is correct, for, if it is, that fact would not effect the conclusion we have here reached.

This switching arrangement between the appellees was continued, and the Illinois Central received into its employment the switchmen, one of whom was the appellant, who had theretofore been working for the Alabama & Vicksburg Railway Company in its Jackson yard.

The Illinois Central Railroad Company on and prior to June, 1926, and thereafter, had a contract with the Brotherhood of Railroad Trainmen which provided for seniority rights of the member of the brotherhood somewhat similar to the seniority rights provided for the members of the Switchmen's Union of North America in the contract of that union with the Alabama & Vicksburg Railway Company. From June, 1926, to
63 November, 1926, the appellant seems to have been given his seniority right under the contract with the Alabama & Vicksburg Railway Company. In November, 1926, the Illinois Central, after a conference between its executive officers and those of the Brotherhood of Railroad Trainmen, adopted and published a new seniority roster effective in the city of Jackson, under which the appellant was given number 57, designating his seniority, when, according to the appellant, as we understand his contention, he should have been given the number 37, the result of which was that he thereafter failed to be called into service for a large number of days extending over the period of time from November, 1926, to October, 1932, when this suit was begun. This roster of November, 1926, came under the observation of the appellant when it was promulgated and he continued thereafter in the service of the Illinois Central Railroad Company without making any objection of the roster until a comparatively short time before this suit was filed in October, 1932.

Section 22 of the contract between the Switchmen's Union of North America and the Alabama & Vicksburg Railway Company provided, under the heading "Seniority Roster", that: That the general chairman and local chairman shall be furnished a copy of the seniority roster each six (6) months, and a copy shall be posted on the bulletin boards available to all switchmen concerned. Any protest as to the correctness of seniority

roster must be made in writing within thirty (30) days. There will be no interchange of seniority between different yards."

No copy of the seniority roster published in November, 1926, was given to either the general or local chairman, but the local chairman, McGehee, learned prior to its publication that a new roster would probably be
64 adopted, and that a conference between the executives of the railroad and of the Brotherhood of Railroad Trainmen would be held for that purpose. He appeared at this conference, but was denied admission thereto. He afterwards made verbal objection thereto, we will assume, to the proper railroad officers, and was informed that the railroad had no contract with the Switchmen's Union of North America. Sometime after the publication of this seniority roster, the exact date of which does not appear, the appellant joined the Brotherhood of Railroad Trainmen.

The record presents a number of questions which it will not be necessary for us to answer, for the one now to be set forth will determine the issue irrespective of the others. That question is this: Assuming for the purpose of the argument that the appellees were obligated to perform the contract of the Switchmen's Union of North America with the Alabama & Vicksburg Railway Company, and that this contract inured to the appellant's benefit, did the appellant waive his rights thereunder? Under this assumption if the appellant was given No. 57 on the roster of November, 1926, when he should have been given the number 37, the Switchmen's Union of North America contract was breached by the appellees when that roster was promulgated and acted on by the Illinois Central Railroad Company; but the breach of a contract of one party thereto can be waived by the other. Was this breach here waived by the ap-

pellant? When this roster came under the appellant's observation, instead of protesting and indicating to the appellees that he would claim his rights under that contract, he continued to work under the new seniority roster, and thereby elected to accept it and to work in accordance with its provisions. Had he made such a protest, the Illinois Central would have had an opportunity to revise the roster, if its obligation to
65 the appellant so required, in doing which it would have necessarily displaced the seniority of other switchmen on the roster, to whom it was also under a similar contractural obligation. The effect of the promulgation of this November, 1926, seniority roster was to offer the appellant and the other switchmen affected thereby a new contract in so far as their relative seniority was concerned, and where the breach of a contract is followed by the offer of another as a substitute therefor, the acceptance thereof waives the breach of the former. By accepting work under the new roster without protest, the Illinois Central was justified in believing that the appellant would claim only thereunder, and that it could safely deal with its other switchmen on that assumption and accord to them their rights thereunder. This was the ground on which the Court below acted.

We have assumed that McGehee's protest inured to the benefit of the appellant; nevertheless that protest did not relieve the appellant of the effect of his subsequent acquiescence in the new seniority roster. Y. & M. V. R. Co. vs. Sideboard, 161 Miss. 4, 133 So. 669, is not in conflict herewith, for there the employee, though continuing to work, did so under protest, indicating at all times that he did *not agree to* the change which his employer sought to make in his status under the contract.

66 DEMURRER TO PLAINTIFF'S REPLICATION TO DEFENDANT'S FIFTH SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore, Plaintiff,
vs. No. 9378
Illinois Central Railroad Company, Defendant.

Now comes the defendant, Illinois Central Railroad Company by its attorneys, and demurs to plaintiff's replication to defendant's fifth special plea in this cause, and for grounds of demurrer says:

1. Said replication and exhibits thereto constitute no defense to the plea of res adjudicata.

2. For other causes to be assigned on the hearing of this demurrer.

Wherefore the defendant prays the judgment of the Court if it shall make further answer to said replication.

MAY & BYRD,
Attorneys for Defendants.

---

67 In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore
vs. 9378.
Illinois Central Railroad Company.

This day this cause came on to be heard upon the demurrers of the plaintiff to defendant's first, second, third, fourth special pleas, and the Court having heard and

considered said demurrers and being advised of its judgment doth adjudge that the said demurrers are not well taken and should be overruled; and the same are hereby overruled, and thereupon the plaintiff declined to plead further to said special pleas.

And there came on for hearing the demurrer of the plaintiff to defendant's sixth special plea, and the Court having heard and considered the same doth sustain said demurrer.

And likewise there came on for hearing the demurrer of the defendant, the Illinois Central Railroad Company, to the replication of the plaintiff to the defendant's fifth special plea, and the Court having heard and considered the same and being advised of its judgment doth sustain said demurrer to said replication, and thereupon the plaintiff declined to plead further to said special plea No. 5.

And it appearing to the Court that the plaintiff, Earl Moore, has declined to plead further to the special pleas hereinabove referred to, and it appearing further unto the Court that the said pleas constitute a good
68 defense to said cause of action, it is Ordered and Adjudged that the said Earl Moore take nothing by reason of his said suit and that the defendant Illinois Central Railroad Company go hence without day.

The plaintiff, Earl Moore, excepted to the action of the Court in overruling said demurrers to special pleas Nos. 1, 2, 3 and 4, and to the sustaining of the demurrer to the replication to special plea No. 5, and the Illinois Central Railroad Company excepted to the Judgment of the Court sustaining the demurrer to defendant's sixth special plea.

It appearing that there are certain exhibits to the declaration in this cause, to-wit, the schedule of wages and rules governing yardmen and switchtenders, governing employees of the Illinois Central Railroad Company, and that there is an exhibit to plaintiff's replication to the defendant's fifth special plea, to-wit, the agreement between the Switchmen's Union of North America and the Alabama and Vicksburg Railway, and it further appearing that each of said documents is printed and that on an appeal to the Supreme Court the Court's convenience will be better served by sending the original of each of said exhibits, it is Ordered that in the event of an appeal each of the original exhibits above referred to be transmitted to the Supreme Court in lieu of copying the same in the transcript of the record.

It is further Ordered that the Plaintiff, Earl Moore, pay all costs in this behalf expended, for all of which let execution issue.

Minute Book No. 23, Page 85-6. Date, Feb. 22, 1937.

---

69 APPEAL BOND.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore, Plaintiff,
vs.
Illinois Central Railroad Company, Defendant.

Know All Men By These Presents: That we, Earl Moore, Principal, and Jone H. Williams and A. E. McGehee, sureties, are held and firmly bound unto the Illinois Central Railroad Company in the penal sum of $500.00, for which payment well and truly to be made,

we hereby bind ourselves, our heirs, executors and administrators forever.

The condition of the foregoing bond is such that there has been lately rendered in this Court a judgment in favor of the principal obligee herein and against the principal obligor and said principal obligor being dissatisfied by said judgment has prayed for and obtained an appeal to the Supreme Court of the State of Mississippi.

Now therefore, if said principal obligor shall well and truly prosecute his cause of action with effect, or pay all costs that might be rendered against him on appeal, this obligation to be void otherwise to remain in full force and effect.

Witness our signatures this the 17 day of May, 1937.

EARL MOORE,
Principal.
JOE H. WILLIAMS,
Surety.
A. E. McGEHEE,
Surety.

Approved this the 19th day of May, 1937.

E. D. FONDREN,
Clerk,
By H. T. ASHFORD, JR., D. C.

---

70 In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore
vs. 9378.
I. C. R. R.

By agreement of the parties hereto it is hereby Ordered that the plaintiff be allowed to amend the declaration herein by increasing the demands of the plaintiff from

$3,000.00 to $12,000.00 and the defendant is allowed to file its petition and bond for the removal of this cause to the District Court for the Southern District of Mississippi, on this day.

Minute Book No. 23, Page 294, Date Feb. 21, 1938.

71 NOTICE OF REMOVAL omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * * *

PETITION FOR REMOVAL omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * * *

BOND FOR REMOVAL omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * * *

77 ORDER OF REMOVAL.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore
vs. 9378.
Illinois Central Railroad Company.

The defendant, Illinois Central Railroad Company, by its attorneys, presented in open Court its petition for the removal of this cause from this Court to the District Court of the United States for the Southern District of Mississippi, and also a bond, with good and sufficient

Surety, in the penalty of two hundred and fifty dollars ($250.00) conditioned as required by the Act of Congress in such cases made and provided; and this being at or before the time said defendant is required by the laws of the State of Mississippi or the rule of this Court, to answer or plead to the amended declaration or complaint of plaintiff in this suit, it is Ordered and Adjudged by the Court that said petition be filed; that said bond (which has been duly proven in open Court) be accepted; that this suit be removed from this Court to the District Court of the United States for the Southern District of Mississippi, at Jackson; that the Clerk of this Court forthwith transmit to that Court a full, true and perfect copy of the record in this suit, duly certified according to law; and that no further proceedings be had in this suit in this Court.

Minute Book No. 23, Page 295; Date, Feb'y. 10, 1938.

---

78 CLERK'S CERTIFICATE, MISS. STATE COURT, omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * *

---

79 RECORD IN THE DISTRICT COURT.

#8086 Law.

Filed April 30, 1938.

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

Earl Moore, Plaintiff,

vs. No. 8086 Law.

Illinois Central Railroad Company, Defendant.

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and with respect shows and

represents unto the Court that this cause originated in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and was removed to this Court from said Circuit Court. That before the removal of said cause and before the same became removable the general issue plea and certain special pleas were filed in said Circuit Court.

That said special pleas have not been passed upon by this Honorable Court.

That this petitioner now desires to withdraw the general issue plea and special pleas numbers 1, 2, 3, 4, 5 and 6 which were filed in said Circuit Court and to be permitted to file in this cause a plea in abatement and it tenders with this motion for filing, in the event the same is permitted by this Court, its special plea in abatement.

80 That your movant believes that by the filing of said plea in abatement the controversy may be concluded without either party incurring large expense, which would be done in the event said plea in abatement is not sustained.

Wherefore, defendant prays permission of this Court to withdraw said special pleas numbers 1, 2, 3, 4, 5 and 6 and the general issue plea and that it be permitted to file its plea in abatement in this cause.

Respectfully submitted,

MAY & BYRD,

Attorneys for Defendant.

81 Filed April 30, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for plea to the declaration exhibited against it in this behalf says that it is now and was at all times mentioned in said declaration a common carrier railroad, engaged in interstate commerce, its line of railroad extending from Chicago in the State of Illinois through the State of Mississippi, and other States of the United States, to New Orleans in the State of Louisiana, and the said Illinois Central Railroad Company as an interstate common carrier railroad was at all times mentioned in said declaration and is now subject to all the provisions of the Acts of Congress of the United States of America pertaining to railroads, and that both the defendant, an interstate common carrier railroad, and the defendant, who was employed by it as a switchman, were and are subject to the terms and provisions of the Act of the Congress of the United States of May 20, 1926, as amended June 21, 1934, found in United States Code Annotated, Title 45, Sections 151 et seq.

That the plaintiff's cause of action against this defendant is based upon an alleged breach of a contract designated as a schedule of wages, rules and working conditions, entered into by and between the Illinois Central Railroad Company and the Brotherhood of Railroad Trainmen, to the benefits of which under said con-

82 tract the plaintiff, Earl Moore, claims to be entitled. That this litigation arose out of a dispute between the plaintiff, Earl Moore, a switchman, as an employee, and this defendant, a carrier engaged in interstate commerce, as to the proper interpretation and enforcement of said agreement between the said Illinois

Central Railroad Company and the Brotherhood of Railroad Trainmen as to whether or not the plaintiff, Earl Moore, was rightfully or wrongfully discharged from the services of the Illinois Central Railroad Company. That the said dispute was pending unadjusted on June 21, 1934. That the contract sued on by the plaintiff in this cause provides in paragraph D of Article 22 as follows:

"(d) Yardmen or Switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or Switchtenders shall have the right to be present and to have an employee of their choice at hearing and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the sus-
83 pension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost."

That the said plaintiff, Earl Moore, after his alleged discharge requested a hearing by his immediate superior, J. F. Walker, Superintendent, from the Louisiana Division of the Illinois Central Railroad Company, and he was accorded such hearing, and at such hearing the said Moore was fully informed of his discharge and the reasons therefor, and the said Moore feeling aggrieved at said

discharge undertook to appeal and did appeal to the defendant's General Superintendent at New Orleans, Louisiana, and the said General Superintendent fixed a date for the hearing of said appeal by the said Moore, but the said Moore failed, refused and declined to attend any hearing on said appeal and abandoned the same. And the said Moore never at any time from the time of his discharge up to this date has appealed to any general officer of the company, and has never requested any decision upon the rightfulness of his discharge from the said General Superintendent of Southern Lines at New Orleans, Louisiana, the general manager, any vice-president or president of the Illinois Central Railroad Company; that the said dispute has not been referred by petition or otherwise by the plaintiff or by the Brotherhood of Railroad Trainmen to the First Division of the National Railroad Adjustment Board, nor has said division of said board made an award thereon. And the said Earl Moore has failed to pursue the remedy set up in said Act of Congress of the United States, Title 45, Section 153, United States Code Annotated, which said remedy is exclusive.

84 Wherefore, this defendant says that this suit has been prematurely brought and the said suit should, therefore, be abated.

And all of this the defendant stands ready to verify.

MAY & BYRD,
Attorneys for Defendant.

State of Mississippi,
County of Hinds.

Before me, the undersigned authority in and for said County and State, this day personally appeared J. L. Byrd, who being by me first duly sworn, says on oath that he is one of the attorneys for the defendant in the

above styled cause and that the matters of fact stated in the foregoing plea in abatement are true and correct as therein stated.

J. L. BYRD.

Sworn to and subscribed before me, this the 30th day of April, 1938.

LESSIE B. KELLOGG,
Notary Public.

(Seal)

My Commission expires June 26, 1941.

---

85 PLAINTIFF'S DEMURRER TO DEFENDANT'S PLEA IN ABATEMENT.

Filed June 3, 1938.

(Title Omitted.)

And now comes the plaintiff herein and demurs to the defendant's plea in abatement to plaintiff's declaration, and for cause of demurrer assigns as follows:

1. That said plea states no facts upon which to abate this action.

2. That under the Railroad Labor Act of 1926, in effect at the time this cause of action arose, the parties must contract to arbitrate before the Labor Board and no such contract is alleged or exhibited.

3. That the Act of Congress relied upon does not require an appeal to the Board, or Boards, therein mentioned, but only sets up a Board to act as arbitrators to which either of the parties may resort.

4. That the facts set forth in said plea show on their face that it would be against public policy to require the parties upon a present money demand to forego an immediate right to resort to the Courts.

86 5. That the contract relied upon in said plea does not require an appeal to the higher officers of the company, but merely gives the plaintiff the right, to be exercised or not at his option, to so appeal, all without a loss of his right to immediately resort to the Courts of the land for redress.

6. There was no case pending at the time of the filing of this suit.

7. That defendant waived the right to file a plea in abatement by filing pleas in bar and going to trial on the merits of this case in the State Court.

8. And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

---

87 (Title Omitted.)

This cause coming on to be heard this day on the motion of the defendant to be permitted to withdraw the general issue plea and pleas numbered 1, 2, 3, 4, 5 and 6, and to be permitted to file in this cause a plea in abatement, and the Court having heard and considered the same, doth sustain said motion and it is Ordered that the defendant be, and it is hereby permitted to withdraw said pleas above numbered and to file its plea in abatement, to which action of the Court the plaintiff excepted and said exception is allowed, it being under-

stood that plaintiff does not waive his right to object to the filing of said plea because of laches or waiver of the defendant of its right to plead in abatement at this time.

And thereupon came on for hearing the demurrer of the plaintiff to said plea in abatement and the Court having heard and considered the same doth sustain said demurrer: To which action of the Court the defendant excepted and said exception is allowed.

And thereupon, on motion of defendant, it is hereby granted fifteen days within which to file further pleas to the declaration in this cause.

Filed June 3, 1938. M. B. 13, p. 821.

---

88 SPECIAL PLEA No. 1.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration filed against it in the above styled cause, says actio non, because it says that never at any time did any contract for hire exist between it and the plaintiff, Earl Moore, for a definite period of time, but on the contrary, this defendant says that the hiring of the said Earl Moore was a hiring at will, the same being terminable at any time at the will and pleasure of either the said Earl Moore or this defendant. And this defendant says that it never at any time employed the said Earl Moore for any definite period of

time, and the said Earl Moore never at any time agreed or bound himself to perform any service for this defendant for any definite period of time, and the said contract being indefinite as to the period for which the plaintiff was hired, is and was terminable at will, and no cause of action accrued to the said plaintiff because of his having been discharged by this defendant.

And this the defendant stands ready to verily.

MAY & BYRD,
Attorneys for Defendant.

---

89 SPECIAL PLEA No. 2.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea in this behalf, says actio non, because it says that the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, upon which the plaintiff bases his cause of action, is void and unenforceable because the same is unilateral, there being no agreement whatever on the part of the said plaintiff to perform any service whatever for this defendant, and this defendant says that said agreement was executed without any consideration therefor and as between the plaintiff and the defendant no independent consideration existed for the execution of said agreement, and no independent consideration moved from either of the parties to said agreement, and said contract was, therefore, without consideration and being unilateral in its terms is unenforceable by the plaintiff.

All of which the defendant stands ready to verify.

MAY & BYRD,
Attorneys for Defendant.

---

90 SPECIAL PLEA No. 3.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that under and by virtue of the terms of the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, which said agreement is the basis for the plaintiff's said suit, the said agreement is not a contract of hiring between the Illinois Central Railroad Company and the individual employees affected thereby, but is, as it is denominated, merely a schedule of wages and rules governing yardmen and switch-tenders, and by said agreement no switchman is employed for any specific period and no switchman agrees to perform any service for said railroad company, and no switchman agrees to perform any service for any specific time, and the said agreement, therefore, furnishes no basis for recovery by the plaintiff in this cause.

And this the defendant is ready to verify.

MAY & BYRD,
Attorneys for Defendant.

91 SPECIAL PLEA No. 4.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, sued on in this behalf, Paragraph D of Article 22 thereof provides as follows:

"(d) Yardmen or Switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or Switchtenders shall have the right to be present and to have an employee of their choice at hearing and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be
92 paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost."

And this defendant avers that on the 15th day of January, 1933, the said plaintiff, Earl Moore, was notified in writing by J. F. Walker, Superintendent of the Louisiana Division of the Illinois Central Railroad Company, that his services as an employee of the Illinois Central Railroad Company were no longer desired and that his employment was at an end effective on that date, and subsequent thereto, on, to-wit, February 17, 1933, the said Earl Moore acting within the terms of said agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, Article 22 thereof addressed to Mr. J. F. Walker, Superintendent at McComb, Mississippi, a letter requesting a hearing before the said Walker, a copy of said letter being hereto attached, marked Exhibit "A", and asked to be taken as a part hereof as fully and completely as if herein written, and defendant says that thereafter on, to-wit, February 18, 1933, the said Superintendent J. F. Walker by letter notified the said Earl Moore, plaintiff, that an investigation in connection with his dismissal from the service on February 15, 1933, would be given to the said plaintiff, Moore, on Monday, February 20, 1933, at 4:00 P. M., at the office of Trainmaster Williams in Jackson, Mississippi, and in addition thereto the said Earl Moore was personally notified of the date
93 of said hearing.

And this defendant says that thereafter on, to-wit, February 20, 1933, at 4:00 P. M., the said Earl Moore accompanied by A. E. McGehee, a representative of his own choosing, appeared at the office of the said T. K. Williams, Trainmaster at Jackson, Mississippi, and was accorded a hearing on the question of his discharge.

That thereafter on, to-wit, the 20th day of February, 1933, the said Earl Moore gave written notice to the defendant, the Illinois Central Railroad Company, that

he desired to appeal from the ruling of the said J. F. Walker, Division Superintendent, to the General Officers of the railroad company, this defendant, and that pursuant to said notice by the said Earl Moore, T. J. Quigley, General Superintendent of the Illinois Central Railroad Company for the southern lines of the Illinois Central Railroad Company, being those lines owned and operated by said company south of the Ohio River, the said Quigley being a general officer of the said Illinois Central Railroad Company and one having jurisdiction of said appeal, advised the said Earl Moore, plaintiff here, in writing on March 6, 1933, fixing Monday, March 13, 1933, at 9:00 A. M., at his office in the City of New Orleans as the time and place where the said Earl Moore's appeal would be heard, but this defendant says that the plaintiff, Earl Moore, failed and neglected to appear at said time, or to prosecute his said appeal, and has never to this day prosecuted said appeal but has in fact abandoned the same and the time for such appeal has long since past. And this defendant says
94 that the said Earl Moore having set in motion the machinery provided by said contract for the settlement of the question of the rightfulness or wrongfulness of his discharge, and not having prosecuted his appeal, but having abandoned the same, is not estopped to question the decision of the officers of the company in discharging him. And this defendant says that under the agreement sued on in this case the decision of the defendant, the Illinois Central Railroad Company, and its employees, which said decision was in good faith, is final and cannot be litigated or inquired into in this proceeding.

And all of this the defendant stands ready to verify.

MAY & BYRD,
Attorneys for Defendant.

Attached thereto is EXHIBIT "A", which is the same as Exhibit "A" to Special Plea No. 4, which has heretofore been copied at page 29 hereof.

---

95 SPECIAL PLEA No. 5.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that on the 15th day of October, 1932, the plaintiff Earl Moore filed a suit in the Circuit Court of the First District of Hinds County, Mississippi, the same appearing on the docket of said Court as No. 8232, being against the Yazoo and Mississippi Valley Railroad Company. By his said suit the said plaintiff alleged, among other things, that by reason of his having been denied his proper place on the seniority roster promulgated by the said Yazoo and Mississippi Valley Railroad Company plaintiff was in effect discharged by said railroad company and he claimed damages in the sum of $20,000.00.

And thereafter on the 23rd day of February, 1933, the said Earl Moore filed his amended declaration against the Yazoo and Mississippi Valley Railroad Company and this defendant, the Illinois Central Railroad Company in said same cause of action or suit, al-

96 leging that by virtue of the fact that he had been given a lower place on the seniority roster of both the defendants in their Jackson, Mississippi, yards he had in effect been discharged by said railroad com-

panies, and that by reason of said erroneous place on said seniority rosters and by reason of said discharge he had been damaged in the sum of $20,000.00. Defendant says that the said amended declaration which was filed on the 23rd day of February, 1933, was after the said plaintiff, Earl Moore, was discharged on February 15, 1933, and was after the date on which any right of action which the said Earl Moore might have had on account of said discharge had accrued.

And said amended declaration further alleged that there had been a breach of contract of hiring existing between the plaintiff, Earl Moore, and the defendant, Illinois Central Railroad Company.

And thereafter, on to-wit, the .... day ....., 1933, this defendant, the Illinois Central Railroad Company, filed its special plea in said cause in the following form, to-wit:

"Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration herein, says that in any event the plaintiff is not entitled to recover pay for any time after the 15th day of February, 1933, because it says that on said 15th day of February, 1933, it notified the said plaintiff, Earl Moore, in writing that his
97 services were no longer desired and that his employment was at an end and his said employment with this defendant did end on said date and any right the said Moore might have had to work for the defendant ceased on said date.

"All of which the defendant stands ready to verify."

And thereafter on, to-wit, the 9th day of May, 1933, the plaintiff, Earl Moore, filed his replication to the said

special plea of this defendant, the said replication being in the following form, to-wit:

"Replication to the Defendant, Illinois Central Railroad Company's Third Special Plea.

"And now comes the plaintiff and for replication to the third special plea of the Illinois Central Railroad Company, heretofore filed herein says that nothing therein contained should defeat or prevent the maintenance of the plaintiff's cause of action, because it is alleged in the declaration and in the exhibits annexed thereto, under Article 17 of said exhibit the following: 'No switchman will be discharged or suspended without just cause' and said special plea does not allege that the said defendant Illinois Central Railroad Company had any sufficient cause for firing the said plaintiff who was a switchman and the said plaintiff does hereby allege and aver that the only reason that he was fired was because he filed this lawsuit seeking a redress of his wrongs in the defendants and plaintiff avers that the filing of a law suit to compel the Court to perform their contract is not sufficient cause within the meaning of said contract of employment.

"All of which the plaintiff is ready to verify."

98 And thereafter on October 1, 1935, issue was joined in short by consent to said replication of the plaintiff, Earl Moore, on said special plea.

And thereafter on, to-wit, Friday, October 4, 1935, said cause of action of the plaintiff, Earl Moore, was tried by the Circuit Court of the First Judicial District of Hinds County, Mississippi, on the amended declaration and the several pleas of the defendant, the Illinois Central Railroad Company, and on the several pleas of the de-

fendant, the Yazoo and Mississippi Valley Railroad Company, including the special plea herein set out, and on replication to said special pleas and joinder of issue on each of said replications and testimony was adduced on the trial of said cause to support the issues, and particularly was testimony introduced on the question of the discharge of Earl Moore by the Illinois Central Railroad Company on the 15th day of February, 1933, the identical discharge which is the basis of the present law suit. And at the conclusion of the hearing judgment was rendered in favor of each of the defendants in said suit, that is to say, in favor of the Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company, as shown by judgment of said Court, copy of which is hereto attached, marked Exhibit "A".

And thereafter the said plaintiff, Earl Moore, appealed from said judgment of the Circuit Court of Hinds County to the Supreme Court of the State of Mississippi, on the 16th day of March, 1936, the said judgment of the Circuit Court of the First District of Hinds County, Mississippi, rendered in said cause, was by said Supreme Court of Mississippi affirmed and said suit was finally terminated adversely to the plaintiff, Earl Moore.

99

That all of the foregoing pleas and proceedings herein referred to appear in the records of the Circuit Court of the First Judicial District of Hinds County, Mississippi, in cause No. 8232, Earl Moore vs. Yazoo and Mississippi Valley Railroad Company, et al., in the records and proceedings of the Supreme Court of Mississippi in case No. 32,063, Moore vs. Yazoo and Mississippi Valley Railroad Company, et al., reported in 166 So. at page 395, reference to the pleas and proceedings in said Circuit Court and in said Supreme Court are prayed to

be made as often as may be necessary on the trial of this cause.

And that this defendant says that by reason of the foregoing facts the said judgment rendered by said Court in said cause No. 8232, Earl Moore vs. Yazoo and Mississippi Valley Railroad Company and Illinois Central Railroad Company, adjudicated all of the things sued for in this suit, and in which said suit the said plaintiff was the same as the plaintiff in the instant suit, and this defendant, the Illinois Central Railroad Company, was a defendant as in the instant suit, and the subject matter of the litigation was the same as the subject matter of the instant suit, and was in a Court
100 having jurisdiction of the parties and of the subject matter. And defendant says that this judgment is res adjudicata of all the matters and things sued for in this suit.

And this the defendant stands ready to verify.

MAY & BYRD,
Attorneys for Defendant.

EXHIBIT "A" to the foregoing Plea, being judgment in Cause No. 8232, entered Minute Book No. 22, p. 426, State Court, was copied heretofore at page 34.

---

101 SPECIAL PLEA No. 6.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special

plea to the declaration exhibited against it in this cause, says actio non, because it says that there was never any written contract of employment between the plaintiff and this defendant; but that the contract of employment between plaintiff and this defendant was verbal and the alleged breach of contract occurred on February 15, 1933, and on said date plaintiff's cause of action, if any he had, or has, arose on said date, and more than three years elapsed from the date of said alleged breach of contract and the date of the filing of this suit, and this defendant says that by reason thereof this said suit is barred by the statute of limitations of three years, as provided by Section 2299 of the Mississippi Code of 1930.

And this the defendant is ready to verify.

MAY & BYRD,
Attorneys for Defendant.

---

102 SPECIAL PLEA No. 7.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says that the plaintiff ought not to have and recover anything by reason of said suit in any event in an amount in excess of thirty days' pay at the rate fixed in the schedule of wages, because the defendant says that the contract sued on in this cause provides, among other things, in Article 25, paragraph B thereof, as follows:

"(B) The rules and rates shall remain in effect until December 31, 1925, and thereafter until revised or

abrogated, of which intention thirty days written notice shall be given."

That is to say the said contract is terminable on thirty days written notice by either party. And this defendant says that the said contract as to said Earl Moore, the plaintiff, was abrogated on the 15th day of February, 1933, by reason of his discharge from the service of this defendant, notice of which discharge was given to the said Earl Moore in writing, and that if not ef-
103 fective on the said 15th day of February, 1932, the same became and was effective thirty days from said date and said contract as to said Earl Moore was ended thirty days after said date.

All of which the defendant stands ready to verify.

MAY & BYRD,
Attorneys for Defendant.

---

104 DEMURRER TO DEFENDANT'S FIRST SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

Now comes the plaintiff, Earl Moore, and demurs to the first special plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns the following:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That the contract sued on showed that it was not a contract terminable at will.

And for other causes to be assigned.

CHALMERS POTTER,
Attorney for Plaintiff.

---

105 DEMURRER TO SECOND SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

And now comes the plaintiff, Earl Moore, and demurs to the Second Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns the following:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That the contract sued on shows on its face that it is a unilateral contract.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

---

106 DEMURRER TO THIRD SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

And now comes the plaintiff, Earl Moore, and demurs to the Third Special Plea, heretofore filed by the de-

fendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That said contract shows on its face that it is a contract between the Brotherhood of Railroad Trainmen, of which this plaintiff was a member and under which contract he worked, and the defendant.

And for other causes.

CHALMERS POTTER.

107 DEMURRER TO FOURTH SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

And now comes the plaintiff, Earl Moore, and demurs to the Fourth Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That paragraph "D" of Article 22 of said contract, quoted in said Fourth Special Plea, does not make it mandatory upon the plaintiff to demand a hearing or take an appeal, but these are only additional and permissible rights granted him under the contract, and said contract nowhere prohibits his right to sue until and unless he had exhausted the right of appeal.

Third: That the finding of the officers of said railroad are not binding because it is contrary to public policy to allow any man or person, natural or artificial, to be a judge of his own cause.

Fourth: That if said contract should be construed as to require that plaintiff demand a hearing and take or prosecute an appeal that the said provisions relied upon in this plea are then contrary to public policy in that they are an effort of the said parties to oust the Courts of the land of jurisdiction granted to them by the constitutional laws of the State of Mississippi.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

---

108 PLAINTIFF'S REPLICATION TO DEFENDANT'S FIFTH SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

Now comes Earl Moore, plaintiff, and for replication to the Fifth Special Plea heretofore filed by the defendant herein, says that although it is true that on the 15th day of October, 1932, this plaintiff filed a suit in the Circuit Court of the First District of Hinds County, Mississippi, being numbered 8232, (and the same was thereafter removed to this Honorable Court,) against the Yazoo & Mississippi Valley Railroad Company, and plaintiff says that said declaration was also filed against this defendant, but that through inadvertence the Clerk of said Court neglected to issue process against this defendant, but

when this matter was called to the attention of the plaintiff therein process was immediately issued against said defendant upon the original declaration, a copy of said declaration being hereto attached marked Exhibit "A" and prayed to be considered a part hereto as fully and completely as if copied herein, but plaintiff denies that on the 23rd day of February, 1933, he filed an amended declaration against the Yazoo & Mississippi Valley Railroad Company and this defendant.

109 It was alleged in said declaration, in suit No. 8232, and the following allegation constituted the gist of plaintiff's action herein, that the defendants therein had breached a contract between the Switchmen's Union of North America, of which plaintiff was, at the time he went to work for the Alabama & Vicksburg Railway Company, a member, in that he had been given a lower place on the seniority roster of both defendants in their Jackson Yards than the place to which he was entitled under the contract; yet plaintiff avers that the basis of his cause of action in said cause, to-wit, No. 8232, was breach of the contract originally entered into between the said Alabama & Vicksburg Railway Company and the Switchmen's Union of North America for a failure of this defendant and the Yazoo & Mississippi Valley Railroad Company to give him the place upon the seniority roster to which he was entitled, the contract between the Switchmen's Union of North America and the Alabama & Vicksburg Railway Company having been expressly assumed as alleged in the pleadings in said cause by the defendants therein, and all other matters alleged either in the declaration or in any subsequent pleading filed by either party thereto, did not form the basis of plaintiff's cause of action therein, but went merely to show and explain the extent of damages suffered by said plaintiff, or any attempt by the defendants to limit said damages.

That the cause of action between the Illinois Central Railroad Company and this plaintiff in said cause No. 8232 is in no way identical with the cause of action here sued on because the cause of action here sued on is based not upon the Switchmen's Union Contract but a contract between this defendant and the Brotherhood of Railroad Trainmen. The basis of this suit is not a failure to give plaintiff the place up the seniority roster to which he conceived he was entitled, but is a suit for his wrongful discharge under a contract of hire.

Plaintiff further alleges that said plea constitutes no defense because cause No. 8232 was decided by the Circuit Court of the First District of Hinds County and affirmed by the Supreme Court, upon the grounds that the contract therein sued on provided that within thirty days after the promulgation of the seniority list, the seniority list therein sued on having been promulgated in November, 1928, that any person not being satisfied with the number given him thereon should, within thirty days after the promulgation of said list, file a written protest; that this the plaintiff, in cause No. 8232, failed to do personally within the time required by the contract between the Switchmen's Union of North America and the Alabama & Vicksburg Railway Company, and for that reason a directed verdict was rendered against said plaintiff, which was affirmed by the Supreme Court of the State of Mississippi, a copy of the opinion of the Circuit Court and the opinion of the Supreme Court both being attached hereto marked Exhibits "B" and "C", respectively, and prayed to be considered a part hereof as fully and completely as if copied herein, and the issue herein involved has never been decided upon its merits either by this Court or any other Court.

All of which the plaintiff is ready to verify.

CHALMERS POTTER,
Attorney for Plaintiff.

EXHIBIT "A" to the foregoing has been previously copied herein, page 42.

EXHIBIT "B" to the foregoing has been previously copied herein, page 47.

EXHIBIT "C" to the foregoing has been previously copied herein, page 48.

---

111 DEMURRER TO SIXTH SPECIAL PLEA.

(Title Omitted.)

And now comes the plaintiff, Earl Moore, and demurs to the Sixth Special Plea heretofore filed by the defendant herein and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: Because nowhere in said special plea is there any denial of any fact set forth in plaintiff's declaration and the declaration shows that the suit is based upon a written contract exhibited with the declaration and not upon a verbal contract and there is no denial of the execution of the contract sued on.

Third: That the allegations of said plea are not responsive to the issue tendered in plaintiff's declaration.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

Filed August 1, 1938.

112 DEMURRER OF PLAINTIFF TO DEFENDANT'S SEVENTH SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

And now comes plaintiff and demurs to the seventh special plea of the defendant, and for cause of said demurrer assigns as follows:

First: That said plea presents no defense to plaintiff's cause of action.

Second: That the contract sued on shows on its face that it is a contract between the Brotherhood of Railroad Trainmen, of which plaintiff was a member, and defendant, and not between plaintiff as an individual and defendant, and that the giving of notice to plaintiff that the contract was abrogated did not terminate said contract as a whole so as to defeat plaintiff's rights thereunder.

Third: To so construe said contract would render meaningless the provision of the contract that plaintiff could not be discharged except for cause, and the provision of the contract providing for seniority of service.

Fourth: And would abrogate and void the Railroad Labor Act of the Congress of the United States providing for collective bargaining between Labor Organizations and Interstate Carriers; and said defendant is such a carrier.

CHALMERS POTTER,
Attorney for Plaintiff.

113 MOTION FOR JUDGMENT.

Filed September 23, 1938.

(Title Omitted.)

And now comes Earl Moore, plaintiff herein, and shows unto the Court that heretofore the defendant, the Illinois Central Railroad Company, withdrew, with leave of the Court, all pleas in bar that had been filed by said defendant at a time when this cause was pending in the Circuit Court of the First District of Hinds County, Mississippi, and filed a plea in abatement.

That said plaintiff demurred to said plea in abatement, and said demurrer to said plea in abatement was by this Court sustained.

That thereafter the said defendant filed seven special pleas, and that this plaintiff demurred to all of said pleas except the fifth, and filed a replication to said fifth special plea, and the defendant railroad company demurred to plaintiff's replication to said fifth special plea. That thereafter the demurrer of the defendant to plaintiff's replication to the fifth special plea was overruled, and the demurrers of the plaintiff to the remaining six special pleas were by the Court sustained.

114 That under the provisions of Section 548, Code of 1930, it is provided:

"If the plaintiff demur to the plea of the defendant, and the demurrer be sustained, the judgment shall be that the defendant do answer over to the declaration; but he shall be compelled to plead to the merits, and the plaintiff shall not be delayed of his trial. And if the plea then filed be demurred to, and such demurrer be sustained, further leave to plead shall not be granted."

Wherefore, under the provisions of the section last above quoted, plaintiff moves that the defendant be not allowed to plead further, and that a judgment be rendered against it with a writ of inquiry to assess plaintiff's damage.

CHALMERS POTTER,
Attorney for Plaintiff.

---

115 ORDER.

Filed October 11, 1938.

C. O. B. 1, p. 57.

(Title Omitted.)

Came on this day this cause to be heard upon the demurrer of the plaintiff to the defendant's first, second, third, fourth, sixth and seventh special pleas, and the demurrer of the defendant to plaintiff's replication, and came the parties in their own proper persons and by their attorneys, and the Court having heard and considered the same; and being of the opinion that the demurrers of the plaintiff are well taken and should be sustained and that the demurrer of the defendant was not well taken and should be overruled.

Therefore, be it and it is hereby Ordered and Adjudged that the demurrers of the plaintiff to the defendant's first, second, third, fourth, sixth and seventh special pleas be, and the same are, hereby sustained; and
116 that the demurrer of the defendant to the plaintiff's replication to its fifth special plea be, and the same is, hereby overruled, to all of which the defendant excepted.

The motion of the plaintiff for judgment, under Section 548 of the Mississippi Code of 1930, be and the same is hereby overruled, to which action of the Court the plaintiff excepted.

It is further Ordered and Adjudged that the defendant do answer, under the new rules of procedure, the plaintiff's pleadings on or before the 20th day of October, 1938, but will not be required to raise the same points which it has heretofore raised.

Ordered and Adjudged this the 8th day of October, 1938.

S. C. MIZE,
United States District Judge.

---

117 United States District Court, Southern District of Mississippi, Gulfport, Mississippi.

Chambers of Sidney C. Mize, District Judge.

August 16, 1938.

Hon. Chalmers Potter,
Attorney at Law,
Jackson, Mississippi.

Messrs. May & Byrd,
Attorneys at Law,
Jackson, Mississippi.

Re: Earl Moore vs. I. C. Railroad Co.

Gentlemen:

I have reached the conclusion that the decision of the Supreme Court of Mississippi in the case of Moore vs.

I. C. Railroad, 176 So. 593 is applicable, and that in view of the McGloin case cited therein the demurrers of the plaintiff to special pleas #1, #2, #3, #4, #6, #7 of the defendant should be sustained, and that the demurrer of the defendant to the replication of the plaintiff to defendant's special plea #5 should be overruled.

I think the decision of the Mississippi Supreme Court, viewed in the light of the Erie Railway Company case by the United States Supreme Court is conclusive upon this Court. The pleadings in the case before the Supreme Court of Mississippi are identical with the pleadings in the case now before the Court with the exception of the 7th Special Plea of the defendant. I think the demurrer to the 7th Special Plea of the defendant is well

118

taken for the reason that it is clear that the intent of the contract was that it could be abrogated as a whole by either party upon 30 days notice of such intent to abrogate. In other words, the Brotherhood, acting through its proper representatives, could have served notice that the contract would be abrogated. Or, under the contract, the Railroad Company could have served notice upon the entire Brotherhood that the contract would be abrogated. It was not the intent of the contract that the Railroad Company could say to one employee that he is discharged within thirty days. I think this meaning is clear and for that reason I sustained the demurrer.

While it is true that a decision of the Supreme Court of Mississippi in a particular case is not necessarily the law of the case for absolute guidance of the lower Federal Court, yet when the case reaches the lower Federal Court the same rules of law with reference to all of the cases apply in the Federal Court as would apply in the Supreme Court of the State itself. If the Federal Court were clearly of the opinion that the last announcement of the Supreme Court was erroneous and in conflict with prior decisions of the Supreme Court on the same

question, which had been overlooked by the Supreme Court, and that the Supreme Court did not intend to overrule such cases or depart from the principles announced therein, then the lower Federal Court would be justified in declining to follow the decision as the law of the case. In the present case, however, it is clear that the announcement of the Supreme Court of Mississippi is exactly what Mississippi Supreme
119 Court intends to hold, and it is, therefore, absolutely binding upon this Court under the decision of the Erie Railway Company case.

I am returning the file of papers to the Clerk there at Jackson, but I do not find that the demurrers have been filed. If so, they are not with this file that has been sent to me. I have assumed, however from the statement of counsel in the argument that it was the intention, and probably there may have been on file in Jackson demurrers to all of the special pleas of the defendant except as to Special Plea No. 5; that as to this plea there was a replication by the plaintiff and a demurrer by the defendant to this replication. I wish you gentlemen would check the file to see that the pleadings are on file to reflect this situation of the record, and then you may draw an order and forward it to me and I will sign it, allowing the defendant such reasonable time in which to plead further as you gentlemen may agree upon. If you cannot agree, then I will fix the time so as to make the case one at issue to be tried at the next convening of Court.

Very sincerely yours,

S. C. MIZE,

District Judge.

120 OPINION.

Filed October 4, 1938.

(Title Omitted.)

Earl Moore, a citizen of Mississippi, sued the Illinois Central Railroad Company, a citizen of Illinois, for damages growing out of an alleged breach of contract. The case originated in the State Court of Hinds County, in which Court the defendant filed six special pleas. The plaintiff demurred to the first four and sixth and replied to the fifth, to which replication the defendant demurred. The lower Court sustained the contentions of the defendant and the case was thereupon appealed by the plaintiff to the Supreme Court. That Court reversed the lower Court holding that the demurrers to the first four pleas and the sixth plea should have been sustained and that the defendant's demurrer to plaintiff's replication should have been overruled. This case is reported in 176 Southern Reporter, page 593.

The mandate of that Court having gone back to the lower Court, the plaintiff thereupon amended his declaration and increased his demand for damages to the sum of $12,000.00. Thereupon the defendant immediately filed a petition to remove to this Court, which was sustained and the case transferred here; therefore, this Court has jurisdiction.

121 There are two major questions to be determined from the record in this Court. The first is the validity of the contract that was entered into between the defendant, Illinois Central Railroad Company, and the Brotherhood of Railroad Trainmen, of which Brotherhood the plaintiff was a member. This contract was a valid contract, although the plaintiff was not a direct party thereto except as made so for his benefit by the agreement of the Brotherhood of Rail-

road Trainmen with the defendant company. It will be unnecessary to detail further the facts of the controversy as they are fully set out in the report of the case in the Southern Reporter supra.

The defendant, after the transfer of the case here, obtained leave to withdraw all of its pleadings theretofore filed and then filed a plea in abatement. A demurrer was filed to this plea and was sustained. Thereafter the defendant filed special pleas 1 to 7 inclusive, but did not file a plea of the general issue. These pleas were substantially the same as were filed in the State Court. The plaintiff contends that the decision of the State Court on these matters is res adjudicata. The defendant contends that the decision of the State Court is simply the law of the case and that this Court has the power to determine for itself the sufficiency of these pleas. It is not necessary to determine whether the effect of the ruling is res adjudicata or the law of the case in view of the holding of the Supreme Court of the United States in the recent case of Erie Railroad Company vs. Tompkins, 304 U. S. Supreme Court Reports, page 64. The decision of the Supreme Court of Mississippi was an announcement of the Court of last resort in this State of the law pertaining to the contract sued upon, and under the Erie Railroad Company case
122 is conclusive.

This Court having announced its intention of sustaining the demurrer of plaintiff to the six special pleas, 1, 2, 3, 4, 6, and 7, and overruling the demurrer of the defendant to plaintiff's replication to the 5th special plea, the plaintiff thereupon objected to the defendant being permitted to plead further and asked for judgment in accordance with Section 548, Mississippi Code of 1930. A construction of that statute, as well as of the Federal rules of civil procedure, which went into effect on September 16, 1938, is therefore presented.

Section 548 of Code of 1930 is as follows:

"If the plaintiff demur to the plea of the defendant, and the demurrer be sustained, the judgment shall be that the defendant do answer over to the declaration; but he shall be compelled to plead to the merits, and the plaintiff shall not be delayed of his trial. And if the plea then filed be demurred to, and such demurrer be sustained, further leave to plead shall not be granted."

Plaintiff contends that this section is mandatory and this Court does not have the discretion to grant further leave to plead. It is doubtful if plaintiff's contention would be sustained under the Mississippi State practice. It has been the policy of the Mississippi Courts, as well as the legislature, to permit amendments liberally in furtherance of justice and of the disposition of controversies on the merits. Section 533 provided that many pleas might be pleaded at the same time when appropriate to the action without leave of the Court along with the general issue. Section 532 of the Code provided that

123 if the plaintiff took issue on a plea in abatement and it was found in his favor, that he should have judgment respondeat ouster and that he should not have judgment quod recuperet, and that the defendant should be permitted to plead to the merits. Section 567 of the Code provides that the Court shall have full power to allow all amendments to be made in the pleadings or proceedings at any time before the verdict so as to bring the merits of the controversy fairly to trial. These sections have been construed by the Court of last resort to permit amendments liberally, and undoubtedly under these sections it would not be an abuse of discretion to permit the defendant to plead further. See also Wilkinson vs. Cook, 44 Miss. 367. However, this question having arisen since the Federal rules of civil procedure became effective, the statutes of

Mississippi are not controlling. The Federal rules of civil procedure control in this Court with reference to pleadings.

Among other purposes of the Federal rules of procedure recently promulgated by the Supreme Court of the United States in pursuance of an Act of Congress authorizing it to be done, is to settle controversies on their merits rather than to have them dismissed on technical points. The Hon. Martin T. Manton, senior Circuit Judge of the Second Circuit, U. S. Circuit Court of Appeals, in a foreword to Moore's Federal Practice on the new Federal rules discusses briefly the history and purpose of these rules. This foreword is full of wisdom and should be read by every member of the bar. One of the outstanding reforms contained in the rules is:

"Decisions are to be on the merits and not on
124 procedural niceties." Moore's Federal Procedure, page 4. Mississippi practice, as hereinbefore shown, was one of liberal amendments, but even in those States where there is a restrictive State practice these Federal rules supersede. and the Federal Courts are no longer obliged to follow any restrictive practice of procedure of the State.—Moore's Federal Practice, page 800 and the authorities therein cited.

The entire spirit of all the rules as adopted is to the effect that controversies shall be decided upon the merits. The very first rule provides that they shall be construed to secure the just, speedy and inexpensive determination of every action. Rules 7 to 14 inclusive deal particularly with pleadings both of the plaintiff and the defendant, and it is not difficult to reach the conclusion that their purpose is to insure a fair trial upon the merits without unreasonable delay and to place upon counsel representing a party much responsibility. Rule 15 deals particularly with the question now before the Court and provides that a party may amend his pleading once as a matter of course at any time before a responsive pleading

is served and that thereafter a party may amend his pleadings only by leave of Court,—"and leave shall be freely given when justice so requires." Likewise paragraph (b) of the same rule permits amendments whenever necessary to conform to the evidence, and the Court shall allow such amendments freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice him upon the merits. Paragraph (c) of rule 81 provides that these rules shall apply to civil actions removed into
125 the District Courts of the United States and shall govern all procedure after removal. Rule 86 provides that all pleadings in actions pending on the effective date shall be governed by these rules, except to the extent that in the opinion of the Court their application would not be feasible or would work an injustice. It, therefore, will be seen that the question involved here is governed by these rules, since their application will not work any injustice upon any of the parties.

It will be unnecessary to mention any other rules, as from the foregoing it is clear that amendments to pleadings are liberally allowed. The defendant in this case in filing these pleas raised substantial questions and was acting in good faith and not for the purpose of delay. His manner of raising his questions was proper under the procedure existing at the time the pleas were filed and the defendant should not be penalized. The defendant will be required to plead under the new rules, but will not be required to raise the same points which he has already raised, but is now specifically given the advantage and allowed an exception to every adverse ruling that has been made by the Court in this case to his defenses.

The demurrers of the plaintiff to defendant's special pleas 1, 2, 3, 4, 6 and 7 are sustained, and the demurrer of the defendant to the plaintiff's replication to the de-

fendant's 5th special plea is overruled. The defendant is allowed fifteen days in which to answer the declaration of the plaintiff in conformity and as provided by the Federal rules of civil procedure. The plaintiff's declaration is substantially in form now as provided
126 by the rules and the plaintiff will not be required to change the form of his declaration. The motion of the plaintiff for judgment declining to permit the defendant to plead further is denied. Orders may be entered accordingly.

SIDNEY C. MIZE,
United States District Judge.

Gulfport, Mississippi, October 3, 1938.

Appearances:
Hon. Chalmers Potter, Jackson, Mississippi,
Representing Plaintiff.
Messrs. May & Byrd, Jackson, Mississippi,
Representing Defendant.

---

127 AMENDMENT TO PARAGRAPH 6 OF DECLARATION BY AGREEMENT WITH THE DEFENDANT.

Filed October 20, 1938.

(Title Omitted.)

That on or about February 15, 1933, and without cause, the said defendant did arbitrarily discharge from its employ said plaintiff by letter, a copy of said letter being hereto attached, marked Exhibit "C" and prayed to be made a part hereof as fully and completely as if copied herein, and although said plaintiff has diligently sought

employment since said time, he has been unable to obtain employment.

CHALMERS POTTER,
By HENRY E. BARKSDALE.

Old Mer. Bk. Bldg., Jackson, Miss.

128 EXHIBIT "C".

Moore vs. I. C. RR. Company.

(Copy) 8086

Illinois Central System.

McComb, Mississippi, February 15, 1933.

Mr. Earl Moore,
Jackson, Miss.

Dear Sir:

This is to advise that your services as an employee of the Illinois Central Railroad Company are no longer desired and your employment is at an end effective this date.

Please deliver to Mr. T. K. Williams, Trainmaster, all Company property now in your possession, including your Annual Pass, as well as switch key and rule books.

Yours very truly,
(Signed) J. F. WALKER,
Superintendent Louisiana Division, Illinois Central Railroad Company.

JFW-EM

129 MOTION TO AMEND DECLARATION.

(Title Omitted.)

And now comes Earl Moore, plaintiff herein, and moves the Court that he be allowed to amend his declaration, heretofore filed herein, by inserting between the first and second paragraphs thereof the following:

"That on May 1st, 1924, the defendant railroad company did promulgate and publish a certain Schedule of Rules and Rates of Pay for Trainmen, which Schedule of Rules and Rates of Pay for Trainmen is, in all respects, identical with the contract entered into by the Brotherhood of Railway Trainmen and the defendant, which is annexed to the original declaration as Exhibit "A", and said published Schedule of Rules and Rates of Pay for Trainmen remained in full force and effect for all times mentioned in the declaration, and said plaintiff was entitled to the benefits conferred by said Schedule of Rules and Rates of Pay for Trainmen to the same extent that he was entitled to the benefits of the contract between said defendant and the Brotherhood of Railway Trainmen attached to the original declaration as Exhibit 'A'."

CHALMERS POTTER,
Attorney for Plaintiff.

---

130 ORDER.

Filed October 25, 1938.

C. O. B. 1, p. 60.

(Title Omitted.)

Came on this day this cause to be heard upon motion of the plaintiff to be allowed to amend his declaration

heretofore filed herein, and the Court having heard and considered said motion and being of the opinion that the same is well taken, it is, therefore, Ordered and Adjudged that said amendment be, and the same is hereby, allowed.

Ordered and Adjudged this 24th day of October, 1938.

S. C. MIZE,
United States District Judge.

---

131 ANSWER OF DEFENDANT.

Filed October 20, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys and for answer to the declaration filed against it in the above styled cause, says:

1. It denies that on February 15, 1933, plaintiff was a member of a certain labor organization known as the Brotherhood of Railroad Trainmen. It admits that on the 15th day of February, 1933, there was in existence an agreement covering the schedule of wages and working conditions governing switchmen and trainmen, which said agreement was between the Illinois Central Railroad Company and the Brotherhood of Railroad Trainmen, and which said agreement provided for rules and rates of pay of trainmen and switchmen.

2. It admits that plaintiff was employed by said defendant as a switchman. The date of his employment being June 2, 1926. But denies that the plaintiff was a member of the Brotherhood of Railroad Trainmen for

a long period of time prior to February 15, 1933, he having been expelled from said labor organization.

3. It admits the allegations of Paragraph 3 of the declaration.

132 4. It admits the allegations of Paragraph 4 of the declaration.

5. It denies that from the date that plaintiff entered the employment of defendant as a switchman in the Jackson, Mississippi, yards plaintiff had rendered faithful and efficient service to the defendant, and denies that the plaintiff had been and was at all times mentioned in the declaration, except when the said plaintiff was sick, ready, willing and able to comply with all rules, regulations and contracts of the defendant.

6. It admits that on February 15, 1933, it discharged plaintiff from its employment, but denies that the said discharge was without cause or was arbitrary. It charges the truth to be that it discharged the said plaintiff for cause, as it had a right to do. The said cause being that the said plaintiff was an unsatisfactory employee in that he had for a long period of time failed to work regularly, although able to do so. The said plaintiff frequently laying off and refusing to work, thereby causing disruption in the proper performance of the duties of the switching crew of which he was a member, and in addition thereto the said plaintiff did on or about the 17th day of October, 1932, file a suit in the Circuit Court of the First District of Hinds County, Mississippi, against this defendant, by which said suit he challenged the action of this defendant in establishing a seniority roster for switchmen and yardmen in the Jackson, Mississippi, yards, which seniority roster was promulgated by this defendant through its officers and employees

after agreement thereto by and between the Brotherhood of Railroad Trainmen, representing a large
133 majority of employees in the Jackson, Mississippi, yards, which said consolidated roster was published by reason of the fact of the combining of the work in the Jackson yards of the Alabama and Vicksburg Railway Company, which was at that time leased by the Yazoo & Mississippi Valley Railroad Company, and the work of the Gulf and Ship Island Railroad Company and the work of the Yazoo & Mississippi Valley Railroad Company and the work of the Illinois Central Railroad Company. That the said Earl Moore, plaintiff in this case, well knowing that said seniority roster had been promulgated as aforesaid, continued to work under said consolidated seniority roster with a number on said roster which had been assigned to him under said consolidated roster, and the said Earl Moore, who had long been a member of the Brotherhood of Railroad Trainmen, although not a member at the date of said suit, knew that the said Brotherhood of Railroad Trainmen, acting through its representatives, had negotiated with the officers of the Illinois Central Railroad Company and with them had agreed upon the consolidated roster. That said suit entered as aforesaid was groundless and was known to, or should have been known to the said Earl Moore as being groundless, but notwithstanding the fact that said suit was groundless, nevertheless the said Earl Moore filed the same. That by reason of the filing of said suit this defendant was caused to expend and did expend large sums of money defending the same, and was compelled to and did bring to Jackson, Mississippi, for the said trial a large number of witnesses at great expense, exceeding $2,500.00; all for the purpose of defending said groundless lawsuit. That this de-
134 fendant was compelled to bring to Jackson, Mississippi, many of its supervising officers who were needed on other points of the railroad to properly

perform their duties and to operate said railroad, and they were caused to lose a great deal of time from their necessary duties; all at a great expense as hereinbefore set out, and all on account of said groundless lawsuit.

That the said Earl Moore, plaintiff herein, was but one of a large number of switchmen in the Jackson, Mississippi, yards who had been affected by the consolidated roster published as aforesaid, and the filing of said suit by the said Moore and his agitation of the question among the other switchmen and the public generally caused dissatisfaction among other employees of this defendant in the city of Jackson, Mississippi, and the same was detrimental to the interests of this defendant. That for many years it has been the rule of the Illinois Central Railroad Company, well known to all its employees, that whenever any of said employees see fit to institute suit against the Illinois Central Railroad Company they immediately forfeit all right to employment by the Illinois Central Railroad Company and are discharged, and this fact was well known to the plaintiff, Earl Moore, when he filed said suit on the said 17th day of October, 1932, and this defendant says that by reason of the foregoing the discharge of the said Moore was not arbitrary and not in violation of any contract existing between this defendant and any other person or organization. And it denies that plaintiff has diligently sought employment since his discharge, and denies that he has been unable to obtain employment.

135 7. The defendant denies that the minimum pay per day provided by said contract was $6.64, and it denies that plaintiff, if he had not been discharged, would have worked a sufficient number of days as No. 52 on the roster to have earned the sum of $12,000.00, and it denies that there was a breach of said contract, and denies that there was an arbitrary discharge of the plaintiff, and

denies that plaintiff has earned nothing since his discharge.

8. It denies that the plaintiff has been damaged in the sum of $12,000.00, or any other amount.

And now having fully answered, defendant prays to be hence dismissed.

ILLINOIS CENTRAL RAILROAD COMPANY,
By J. L. BYRD,
Attorneys.

MAY & BYRD,
Attorneys for Defendant.

---

136 (Title Omitted.)

Appearances:
Honorable Chalmers Potter, Jackson, Mississippi,
Attorney for Plaintiff.
Messrs. May & Byrd, Jackson, Mississippi,
Attorneys for Defendant.

Stenographer's transcript of testimony taken at the trial of the above styled case before Honorable Sidney C. Mize, United States District Judge, at Jackson, Mississippi, on November 10, 1938.

137 EARL MOORE, Plaintiff, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:
Q. You are the plaintiff in this case?
A. Yes, sir.

Q. Where do you live?

A. Jackson.

Q. What was your first railroad experience and with what railroad?

A. In 1920 with the Alabama & Vicksburg Railroad.

Q. You continued to work there until the Y. & M. V. leased it in 1926?

A. Yes, sir.

Q. From 1926 to February, 1933, by whom were you employed?

A. I. C.

Q. In what capacity?

A. Switchman.

Q. Does the I. C. Railroad Company have what they call a service card?

A. Yes, sir.

Q. On each employee?

A. Yes, sir.

Q. What is supposed to be noted on that card by the railroad?

A. If a man has ever had demerits it is sup-
138 posed to be on it.

Q. The lawsuit that has been mentioned was a suit that you filed against the I. C. and Y. & M. V. in the Circuit Court of Hinds County in 1932?

A. Yes, sir.

Q. At the trial of that case in response to an interrogatory addressed under the State statute to the defendant in this case, did the defendant file a copy of your efficiency record?

A. They did.

Q. I will ask you if this is a copy of that efficiency record?

A. It is.

By Mr. Potter:

We now desire to introduce in evidence page 117 of the Supreme Court Record in the case of Earl Moore vs. I. C. R. R. Co.; Exhibit "A" to this record.

139 EXHIBIT "A".

(Page 117—Transcript Supreme Court of Mississippi.)

Exhibit No. 3 Witness Plaintiff.

Date 10/2/35.

R. S. Streit, Official Reporter.

(Copy Efficiency Record.)

Born 6/13/1900.

		Pen.	Cr.	B. No.
11/ 2/1920	Entered Service A&V Ry as switchman.			
6/ 3/1926	Transferred to IC RR as switchman, Jackson, Miss.			
11/23/1926	Failure to have watch comparison 2nd period October—		5	
4/30/1927	By Circular 6—			Clear
8/23/1928	Re-examined on Rules, and qualified Certificate 19073.			

1/16/1929	Re-examined physically and qualified.	
9/13/1929	Failure to get watch comparison August "A"—	5
2/13/1930	Examined on Transportation Rules as Engine Foreman.	
3/13/1930	Circular 6—	Clear
9/14/1939	Re-examined and qualified on Rules Certificate 6620.	
8/ 3/1932	Granted 6 months leave of absence from July 27, 1932 —sickness.	
2/15/1933	Dismissed account unsatisfactory service.	
2/17/1933	Requested hearing.	
2/20/1933	Hearing granted at Jackson, Miss., and decision rendered against him by Superintendent.	
	Moore appealed to Gen. Supt. Quigley but did not pursue his appeal.	

139-a Q. During the entire period that you worked for the I. C. R. R. Co. how many demerits were marked against you?

A. Ten.

Q. Ten penalties of five demerits each for failure to attend watch inspection?

A. Yes, sir.

Q. What is this book that I now hand you? This book that is marked Exhibit "A" to the plaintiff's declaration?

A. I. C. R. R. Company's schedule of rules and
140 rates of pay of trainmen.

Q. By whom is that book published and distributed?

A. I. C. R. R. Co.

By Mr. Potter:

We now desire to introduce this book in evidence as Exhibit "B" to the testimony of Mr. Moore.

The foregoing Exhibit was filed as Exhibit "A" to the Declaration, and, per agreement of Counsel, the essential portions thereof have been heretofore herein copied at page 5.

Q. When a demerit or set of demerits are awarded against a person, how many demerits must accumulate in order to have an employee suspended?

A. Ninety.

Q. Is that found in these rules that I have just shown you?

A. Yes, sir.

By Mr. Potter:

I would like to read that.

By Mr. Byrd:

We object to that as it is not a part of the contract that is sued upon. I am not objecting to the introduction, but I am objecting to the inference that it is a part of the contract that he sues on. We don't concede that which he has introduced is a part of the Railroad Rules regarding switchmen.

141 By the Court:

I will overrule the objection.

Q. In order to clear up the matter properly for the Court, when a reprimand in multiples of five are placed against the record of an employee with satisfactory service, he can work those demerits off?

A. Yes, sir.

Q. And then his record is clear just as if no demerits had ever been assessed?

A. Yes, sir.

Q. And your service record that has been introduced in evidence shows that you had worked those demerits off?

A. Yes, sir.

Q. And when you were discharged there were no demerits against you?

A. No, sir.

Q. This official record of yours shows that you were granted six months leave of absence in July, 1932. Did you in February, 1932 report to anyone in Jackson for a physical examination?

A. Yes, sir.

Q. Who?

A. Dr. Barksdale.

Q. What relation did Dr. Barksdale bear with the Company?

142 A. Chief surgeon.

Q. I now hand you an instrument purporting to be a surgeon's discharge certificate of February 2, 1933.

By whom is that signed?

A. Dr. J. W. Barksdale.

By Mr. Potter:

We now desire to introduce in evidence, with leave to substitute a copy, page 155 of the Supreme Court record in the case of Earl Moore v. I. C. R. R. Co.,—Exhibit "C" to the testimony of Mr. Moore.

143 EXHIBIT "C".

Page 155 Supreme Court Transcript.

(Exhibit 6 to Witness Moore testimony.)

Illinois Central System
Hospital Department Form C. S. 11

Surgeon's Discharge Certificate

Feb. 2, 1933

To R. W. Bardin (Employing Officer)
The Bearer Earl Moore
Occupation Switchman at Jackson, Miss., has been under my professional care since 1-18 1932 is hereby discharged, being able to resume work.

J. W. BARKSDALE,
Surgeon.

Important Notice.—When an Employe is injured on duty this certificate must be filled out by the attending Surgeon in triplicate, the first copy forwarded to the chief Surgeon, Chicago, the second copy forwarded to the Local Claim Agent covering the territory in which the accident occurs, and the third copy be given to the employe who will pre-

sent it in person to his employing officer. In cases where Employes are injured off duty or in medical cases, it will only be necessary that one certificate be filled out at the time the employe is able to resume work, and the latter will present it personally to his employing officer, indicating that he is discharged from further treatment.

143-a Q. Mr. Harding at that time was your immediate superior?

A. Yes, sir.

Q. Holding the position of Yard Master in Jackson?

A. Yes, sir.

Q. He is now dead?

A. Yes, sir.

Q. When you received that certificate from Dr. Barksdale did you report to anyone, and if so, to whom?

A. I reported to Yard Master R. W. Harding.

Q. Had you been able to go to work? I notice that Dr. Barksdale states that you had been under his professional care since January 18, 1932. Had you been able to perform any duties of switchman since January 18, 1932?

A. No. sir.

144 Q. Because of your physical condition?

A. Yes, sir.

Q. What has been the state of your health since Dr. Barksdale gave you that certificate?

A. Good.

By Mr. Porter:

In view of your Honor's ruling that it becomes a question of good faith of this man in filing the law suit, and after the ruling has been made, we offer in evidence the pleadings, opinion of the Circuit Judge and opinion of the Supreme Court in the case of Earl Moore v. Y. & M. V. R. R. Co. and I. C. R. R. Co., it being agreed that this is the case referred to by the defendant in its answer. Exhibit "D" to the testimony of Mr. Moore. (The Judgment is

copied page 34, supra; the Declaration at page 42; Opinion Circuit Court, page 47; Opinion Supreme Court, page 48, and some of the pleadings are copied in Special Plea No. 5, page 29.)

By Mr. Byrd:

I agree to that but I desire to object to the introduction of the record because it unnecessarily encumbers the record.

By The Court:

I will overrule the objection.

Q. That case, the record of which we have just introduced in evidence, was a case growing out of the
145 fact that prior to November, 1929 and from the date of the lease in 1926, the I. C. R. R. Company had maintained two separate yards in Jackson, was it not?

A. Yes, sir.

Q. One known as the West Yard and another known as the North Yard?

A. Yes, sir.

Q. Who worked at the West Yard?

A. The employees of the A. & V.

Q. Who worked at the North Yard?

A. I. C. employees.

Q. Up until the seniority list of 1929, how many seniority lists were maintained?

A. Two prior to November.

Q. They had a separate seniority list for the North yard?

A. Yes, sir.

Q. And a separate list for the West yard?

A. Yes, sir.

Q. In November a consolidated seniority list was published?

A. Yes, sir, on the 13th.

Q. On that consolidated seniority list were you given your correct age at which you went to work for the A. & V.?

A. No, sir.

Q. You were given a later age, were you not?

A. Yes, sir.

Q. What was the approximate ratio between
146 the number of engineers working in the North yards and the number of engineers working in the West yards?

A. The North Yards worked 12 engineers and the West Yards worked 4 engineers.

Q. Were the old A & V. switchmen put on on a basis of 3 to 1?

A. Two of them.

Q. And the next one was numbered what?

A. I don't recall that exactly. The third man was J. C. Hampton, 36.

Q. And thereafter there were put on 4 I. C. men and 1 A. & V. man?

A. No, 5.

Q. Your number was what?

A. 52.

Q. When did you start working for A. & V.?

A. November 2, 1920.

Q. When did you start working for I. C.?

A. June 2, 1926.

Q. What age were you given on the seniority list?

A. September, 1924.

Q. As I understand it, there were two labor organizations to which switchmen belonged and they were the Brotherhood of Railroad Trainmen and the Switchmen's Union of North America?

A. Yes, sir.

Q. The Switchmen's Union of North America had priority over the I. C.?

147 A. Yes, sir.

Q. And the Brotherhood had a contract with the I. C. R. R. Co.?

A. Yes, sir.

Q. You belonged at the time you were working for the Alabama & Vicksburg Railroad Company to the Switchmen's Union of North America?

A. Yes, sir.

Q. And you later became a member of the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. When did you become a member of the Railroad Trainmen?

A. Sometime in 1927.

Q. Please state whether or not under the constitution and rules of each of these organizations they have what is known for each local lodge as the grievance man?

A. Yes, sir.

Q. What, in general, are the duties of the grievance man?

A. To handle all the disputes.

Q. Between whom?

A. Trainmaster and officials of the Railroad.

Q. Between the members of the Union and the officials of the Railroad Company?

A. Yes, sir.

Q. Who was the grievance man of the Switchmen's Union of North America? I mean at the lodge located at Jackson at the time of the consolidation of the

148 roster in 1929?

A. A. E. McGehee.

Q. When that was published, with the exception of the first two men on the seniority list that has been introduced in evidence here, there is the negro John Tobias and Dolittle, who were given their actual age, did all of the members of the Switchmen's Union of North America feel that they were aggrieved?

By Mr. Byrd:
We object.

By the Court:
I will sustain the objection because that covers too wide the field under the question of good faith.

Q. Did Mr. McGehee take up with the officials of the Railroad a grievance on behalf of you and others, and if it was you and others, what others?

A. It was me and all the other men that were members of the Switchmen's Union.

Q. That had formerly worked for what Railroad?

A. Alabama & Vicksburg.

Q. Did he take that up after the promulgation of this roster?

A. Yes, sir.

Q. With whom?

A. Mr. R. W. Hartner.

Q. Was he able to effectuate any settlement with the Railroad Company?

A. No, sir.

149 Q. You did not personally file any protest with the Railroad Company?

A. No, sir.

Q. Not until January, 1931?

A. Yes, sir.

Q. Sometime in the year 1932 after you didn't get any relief, what did you then do?

A. Filed a law suit.

Q. Before you filed your lawsuit, what did you do?

A. Talked to the Superintendent of the I. C., the Louisiana Division.

Q. You couldn't get any relief from them?

A. No, sir.

Q. After you couldn't get any relief at all from the Railroad Company, what did you then do seeking to de-

termine whether you had any lawsuit or not? Did you take any steps looking toward getting any legal rights as to yourself?

A. Yes, sir.

Q. What did you do with reference to that?

A. I talked to an attorney.

Q. What attorney?

A. Mr. Chalmers Potter.

Q. At that time did I have any associate?

A. No, sir.

Q. Did you lay all the facts before me?

150 A. Yes, sir, I did.

Q. And what was my advice to you?

A. That I had a cause of action.

Q. Did you act in good faith on my advice?

A. I did.

By Mr. Byrd:

We object because the facts speak for themselves.

By the Court:

I will overrule the objection as the state of mind is competent as one of the circumstances.

Q. Would you have filed the lawsuit if reputable attorneys had not advised you that you had a cause of action?

A. No, sir.

By Mr. Byrd:

We object.

By the Court:

Objection sustained.

Q. Now, as I understand it, you had performed your duties for this Railroad Company from early in January, 1932 up until the date that you were discharged?

A. Yes, sir.

151 Q. Is that true or not?

A. Yes, sir.

Q. Then on February 15, 1933 did you receive a letter from Mr. Walker, Superintendent of the Louisiana Division?

A. Yes, sir.

By Mr. Potter:

We desire to introduce in evidence the letter of February 15, 1933 from Mr. Walker to Mr. Moore,—Exhibit "E" to the testimony of Mr. Moore.

(This Letter has been copied herein at page 96.)

Q. After that did you demand a hearing?

A. Yes, sir.

Q. Who was your representative?

A. Mr. A. D. McGehee.

Q. Was that hearing taken down by a stenographer?

A. Yes, sir.

Q. On your behalf did I obtain from the Railroad Company a copy of that hearing?

A. Yes, sir.

Q. I will ask you if this is a copy of that hearing that the Railroad Company furnished me?

A. Yes, sir.

152 By Mr. Potter:

We desire to introduce in evidence copy of the hearing as EXHIBIT "F" to the testimony of Mr. Moore.

Hearing given Mr. Earl Moore in Trainmaster's Office at Jackson, Miss., February 20, 1933, at 4:00 p. m., upon request contained in his letter of February 17, 1933, at which were present Mr. J. L. Morgan, Agent, and Mr. A. E. McGehee, representing Mr. Moore.

Questioned by Mr. J. F. Walker, Superintendent Illinois Central R. R.:

Q. Mr. Moore, I have your letter February 17th in which you asked for a hearing, and I am ready to give you the hearing as per your letter of the above date. What is your full name?

A. Earl Moore.

Q. Do you wish a representative present at this hearing, Mr. Moore?

A. Yes, sir, Mr. McGehee.

Q. You are employed with the Company, Mr. McGehee?

A. Yes, sir.

Q. Just what is it you want, Mr. Moore?

A. I want to know what I was taken out of service for.

Q. In your letter February 17, 1933, you asked to be advised the reason for your dismissal from the service of the Railroad Co.; I wish to advise you that you were dismissed account of being an unsatisfactory employe.

A. An unsatisfactory employe?

Q. Yes.

A. In what way?

Q. Isn't it a fact that instead of giving the
153 Management of the Railroad Company an opportunity to handle your case to a conclusion you took the matter up through the Courts?

A. No, sir.

Q. You have not entered suit against the Railroad Company?

A. I have.

Q. You have?

A. Yes, sir.

Q. I have nothing further to add to my statement as stated before.

A. I am taken out of service for unsatisfactory service; will you give me a letter to that effect?

Q. You were taken out of service as an unsatisfactory employe. You asked me if I would give you a letter to that effect?

A. Yes, sir.

Q. I will give you a letter.

A. I am not taken out of service because of the law suit entered against the Railroad?

Q. I stated before what you were taken out of service for.

(Secretary was asked to read answer to question as to why Mr. Moore was taken out of service, and answer was read as follows: "In your letter February 17, 1933, you asked to be advised the reason for your dismissal from the service of the Railroad Co. I wish to advise you that you were dismissed account of being an unsatisfactory employe.")

Q. There is nothing else you want to know concerning this case?

154 A. No, sir.

Question asked by Mr. McGehee, representing Mr. Moore:

Q. This question you asked him about not handling with the Railroad Company. That is one reason he asked me to sit with him on this case. I was local Chairman.

A. Mr. McGehee, you misunderstood my answer to this question.

(Secretary was asked to read the answer to question, which was read as follows: "Isn't it a fact that instead of giving the Management of the Railroad Company an opportunity to handle your case to a conclusion you took the matter up through the Courts?") After the answer was read to Mr. McGehee he had nothing further to say.

Questioned by Mr. J. F. Walker, Superintendent:

Q. Unless you have something else, that is all I have to say.

A. That is about all I know of.

Q. We will write you a letter.

A. You will also send me a service letter?

Q. Yes, I guess we can furnish you with that. You will have to request it by letter.

155 By Mr. Potter:

We now desire to introduce a paragraph from Section 3 of the lease between the Y. & M. V. and A. & V. Railroad Company,—EXHIBIT "G" to the testimony of Mr. Moore.

Section 3. The Lessee covenants that it will at all times for and during the term hereof, at its own cost and expense, assume and fully perform, according to the true intent thereof, during their existence, all contracts, agreements and undertakings of the Lessor existing at the effective date hereof and relating to the leased property or the use thereof, and also all contracts, agreements and undertakings of the Lessor which may at any time hereafter be entered into by the Lessor, with the written approval of the Lessee, in accordance with the provisions of this Indenture, and that it will save the Lessor harmless from any and all liability, loss or expense resulting from or incident to any claim made against the Lessor growing out of any failure of the Lessee so to do; that it will do all acts necessary and appropriate to prevent the forfeiture or loss of any of the Lessor's property, rights or franchises, and will refrain from the doing of any act which would cause or tend to cause such forfeiture or loss. It is understood that the Lessee assumes the leases for the general offices of the Lessor in the Queen & Crescent Building, New Orleans, Louisiana, expiring October 1, 1928, and all leases of offices of freight and passenger agencies, but that the Lessee does not assume under any provision of this Indenture liability on any contracts of employment (other than contracts with labor unions) made by the Lessor, extending beyond four months after the effective date of this Indenture.

156 Q. I notice in the efficiency record that was introduced that you were examined on the 13th of February, 1930 under the transportation rules as an engineer foreman. Is that true?

A. Yes, sir.

Q. In 1930, shortly thereafter, did you or not receive a promotion?

A. I did.

Q. To what capacity?

A. Engineer foreman.

Q. After you consulted me with reference to your rights under the consolidated roster, which you conceive to be in violation of your rights, do you know whether or not your lawsuit was immediately filed or whether an extensive investigation was made by me?

A. An extensive investigation was made.

Q. Did you file that lawsuit for the purpose of harrassing the Railroad Company, or did you in good faith file that lawsuit seeking to vindicate what you and I conceived to be your legal rights?

157 By Mr. Byrd:

We object.

By the Court:

I will sustain the objection on the ground that it has already been answered.

Q. What is the book that I now hand you?

A. Illinois Central Railroad System of Transportation Rules.

Q. By whom is this promulgated?

A. Illinois Central Railroad Company.

By Mr. Potter:

We wish to introduce this book as EXHIBIT "H" to the testimony of Mr. Moore.

(Not copied per agreement of counsel).

Q. Do you know of any other published rules that the Illinois Central Railroad Company has?

A. No, sir.

Q. After you were discharged by the Railroad Company, what was the first employment that you were able to secure?

A. November 16, 1936 with the United States Government.

Q. In what capacity?

A. Post Office Fireman.

Q. At what salary?

158 A. $105.00.

Q. You have continued to hold that job from that time until the present time and still hold that job?

A. Yes, sir.

Q. In response to an interrogatory filed in this case in the State Court before it was removed to the Federal Court, did the Ilinois Central Railroad Company furnish you with the number of days that Mr. Cutler had worked since February 15, 1936 and the amount that he earned?

A. Yes, sir.

Q. And they also stated in that the number of days that you would have been entitled to work had you not been discharged, did they not?

A. Yes, sir.

By Mr. Potter:

We now desire to offer in evidence the answers to the interrogatories propounded to the Railroad Company, which are found at page 9 of Supreme Court Record No. 32860, as EXHIBIT "I" to the testimony of Mr. Moore.

(The above copied herein heretofore at page 20.)

By Mr. Potter:

Without the necessity of interrogatories, the Railroad Company has furnished us with a statement of the earnings of Mr. Cutler, who was the next numbered man below Mr. Moore, up to date and we desire to introduce that in evidence. Exhibit "J" to the testimony of Mr. Moore.

EXHIBIT "J" TO TESTIMONY OF EARL MOORE.

Statement of Time Made and Wages Earned by H. H. Cutler, Employed as Switchman by IC RR at Jackson, Miss., Jan. 1, 1933, to Oct. 15, 1938.

		1933		1934		1935		1936		1937		1938	
		Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount
Jan.	A.....	4	24.50	6	38.43	11	72.17	12	80.06	13	95.92	10	75.86
	B.....	4	24.86	6	37.02	12	78.89	14	96.92	10	78.67	12	95.09
Feb.	A.....	4	24.06	14	86.18	13	82.49	10	67.09	13	104.21	8	60.78
	B.....	4	24.61	10	60.85	8	51.25	11	78.64	11	85.11	12	91.53
Mar.	A.....	2	11.92	14	84.92	14	94.04	15	106.60	12	94.52	14	109.25
	B.....	5	30.56	12	72.79	12	78.76	11	80.01	13	99.92	12	94.80
Apr.	A.....	2	11.92	14	85.66	13	87.08	14	100.76	14	109.21	15	115.41
	B.....	3	16.48	8	46.96	12	82.56	12	86.48	10	74.62	11	86.08
May	A.....	7	40.98	11	68.39	13	89.46	10	71.67	13	99.65	12	90.96
	B.....	10	60.85	12	72.78	9	60.45	15	107.23	11	81.76	14	105.47

Jun.	A.....	7	43.06	12	72.72	5	33.84	15	108.44	12	87.57	13	98.87
	B.....	9	54.96	8	52.58	2	13.76	11	80.55	13	96.34	13	98.30
Jul.	A.....	6	37.22	4	24.49	9	62.56	14	102.37	13	94.18	12	89.37
	B.....	8	49.58	6	37.08	14	98.78	12	87.96	12	89.97	14	104.84
Aug.	A.....	5	30.57	9	56.15	11	74.46	15	108.98	14	107.21	13	99.04
	B.....	10	62.28	13	80.77	14	94.81	11	78.94	12	89.30	13	98.87
Sep.	A.....	13	79.25	14	87.22	14	100.14	14	104.92	14	108.27	14	113.16
	B.....	14	86.04	12	75.64	12	87.69	12	91.17	12	91.04	12	100.07
Oct.	A.....	15	95.45	15	96.42	15	110.18	14	105.45	13	117.17	14	111.24
	B.....	11	69.62	10	65.95	11	81.62	12	92.11	13	103.09		
Nov.	A.....	9	56.32	15	98.49	14	100.68	13	96.57	13	111.06		
	B.....	7	43.27	11	69.14	12	83.45	12	90.64	12	95.65		
Dec.	A.....	6	37.62	12	76.23	14	99.14	11	80.82	12	99.07		
	B.....	5	31.06	6	37.66	9	64.41	11	82.69	11	83.86		
Total	.....	170	1047.04	254	1584.52	273	1882.67	301	2187.07	296	2297.37	238	1838.99

160 Cross Examination.

By Mr. Byrd:

Q. You filed your other suit claiming under the Switchmen's contract, the contract with the Switchmen's Union of North America?

A. Yes, sir.

Q. And you stated on your cross examination in the trial of the case in Jackson that you were not relying upon any other contract, but were suing for relief under the contract of the Switchmen's Union of North America with the Alabama & Vicksburg Railroad Company?

A. At that time.

Q. The Switchmen's Union of North America had no contract with The Illinois Central Railroad Company covering the operations in the Jackson, Mississippi yard?

By Mr. Potter:

We object because that is a matter of law.

By the Court:

Objection overruled.

A. No, sir.

Q. After the Yazoo & Mississippi Valley Railroad Company leased the lines of the Alabama & Vicksburg Railroad Company, for sometime operation was carried on in what is known as the old A. & V. Yards in Jackson?

161

A. Yes, sir.

Q. And you were switchman in that Yard?

A. Yes, sir.

Q. You had your work service in that Yard?

A. Yes, sir.

Q. Sometime after the lease it was decided to combine the old A. & V. Yard with the I. C. Yard?

A. Yes, sir.

Q. When it was combined a question arose as to what service would be given the men from the two yards in the consolidated yard?

A. Yes, sir.

Q. And the Brotherhood of Railroad Trainmen who had the contract at that time with the I. C. R. R. Company covering the Jackson, Mississippi yard through its representative and the management through its representative worked out this consolidated roster that was afterward put in effect in Jackson?

A. Yes, sir.

Q. How many A. & V. Switchmen were there?

A. I don't know exactly how many were there.

Q. About how many?

A. About 14 I think.

Q. How many I. C. Switchmen?

A. I don't know that.

Q. About how many?

162 A. I guess it was thirty some odd.

Q. As the result of that agreement between the management and the representative of the Brotherhood of Railroad Trainmen a consolidated roster was put out for the Jackson, Mississippi yard on which the A. & V. men, outside the two last men were put on that old I. C. Roster on the basis of one A. & V. man to every five I. C. men?

A. Yes, sir.

Q. The effect of that was a man on the I. C. Railroad who was below the A. & V. man in seniority was shoved down at least 15 places, wasn't he?

A. The A. & V. man was put down.

Q. No, the I. C. man was shoved down, at least the lowest I. C. man was put down at least 15 men?

A. The I. C. men weren't disturbed.

Q. When they put in a man ahead of them he was disturbed?

A. Not on the seniority list.

Q. But they put some A. & V. men ahead of him,—ahead of the lower I. C. men?

A. In every five men they did.

Q. So when an A. & V. man might have gotten a lower seniority rating, it also resulted that way for the I. C. men sometimes?

A. It did in a few, yes, sir.

Q. You take Mr. Mauphis over there. He is a switchman. He had a place on the roster which was reduced on account of the A. & V. men being put in ahead
163 of him, didn't he?

A. I was working before Mr. Mauphis ever went to work.

Q. I am talking about the switchman who was rated under you?

By Mr. Potter:

We admit that.

By the Court:

That is the only conclusion that can be drawn.

Q. When they made the consolidated roster it worked to the disadvantage of the I. C. men as well as the A. & V. men?

A. Yes, sir.

Q. You had a representative in the Switchmen's Union of North America?

A. Yes, sir.

Q. And under the contract with the railroad, whatever railroad it was, you say the I. C. assumed it—whatever railroad it was, there was machinery set up for bringing in complaints or grievances in regard to their seniority for the attention of the management of the I. C. Railroad?

A. Yes, sir.

Q. Did you use that machinery?

A. Yes, sir.

Q. Did you take it to the management of the I. C.?

A. Yes, sir, to the Board.

164 Q. What Board?

A. Labor Board.

Q. The Labor Board turned you down?

A. No, sir.

Q. What happened to it?

A. It is still there.

Q. It has been pending there how long?

A. Seven years.

Q. At the time you filed your suit how long had it been pending?

A. I don't know.

Q. The Brotherhood of Railroad Trainmen had machinery which you could have set in motion to review this question and have it tried out again?

A. They had one, yes, sir.

Q. Did you start that machinery in motion?

A. No, sir.

Q. When did you become a member of the Brotherhood of Railroad Trainmen?

A. I don't know exactly, but somewhere around 1927.

Q. When was this consolidated seniority roster put into effect?

A. November 13, 1926.

Q. The very next year you became a member of the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. When they put out the consolidated list you continued to work under it?

A. Yes, sir, under protest.

165 Q. You continued to work under it for about five years before you filed your suit?

A. Yes, sir.

Q. In fact, it just lacks about a month of being six years before you filed your suit?

A. Yes, sir.

Q. And during that time you say you were complaining?

A. Yes, sir.

Q. Who were you complaining to?

A. The officials of the Illinois Central.

Q. What officials?

A. From the Trainmaster to the General Manager.

Q. Did you ever complain to Mr. T. K. Williams?

A. I complained to Mr. McLauren.

Q. He was the Superintendent. Did you ever complain to Mr. Williams?

A. No, sir.

Q. He was your head superintendent?

A. Yes, sir.

Q. You did go over the heads of the officers and complain to Mr. Atwell, the General Manager in Chicago?

A. Yes, sir.

Q. You wrote him letters about it?

A. Yes, sir.

Q. You didn't tell your superintendent that
166 you were writing letters?

A. No, sir.

Q. You didn't set the machinery of your own organization in motion?

A. No, sir.

Q. You worked on this consolidated roster for practically six years before you ever filed your lawsuit?

A. Yes, sir.

Q. And during all this time you were agitating it down there in the Yard?

A. No, sir.

Q. Didn't you say something to Mr. McGee about it?

A. I did at the time I filed the lawsuit.

Q. I am talking about before you filed the lawsuit?

A. No, sir.

Q. Didn't you say anything about it to any of the other A. & V. Switchmen?

A. No, sir.

Q. Didn't you seek and get contributions from other A. & V. switchmen to help you pay the lawyer's fee and expenses of the trial?

A. No, sir.

Q. Didn't you agree with the other switchmen that your suit would be the test suit and you would file this suit and carry it through to conclusion as the basis for them filing a suit themselves?

A. No, sir.

Q. You deny that?

167 A. Yes, sir.

Q. When you went and got this certificate from Dr. Barksdale, where had you been? How long had you been off?

A. I had been off about six months.

Q. How long had you been sick?

A. All that time.

Q. All the whole six months?

A. Yes, sir.

Q. When did you decide that you were in shape to go back to work?

A. When the time was up.

Q. What time?

A. On February 2, 1933.

Q. Was that the time your leave of absence expired?

A. I think it was a little later.

Q. You were given a leave of absence on July 2, 1932?

A. Yes, sir.

Q. For six months?

A. Yes, sir.

Q. When did you report back to work?

A. On February 21, 1933.

Q. When you presented this certificate of Dr. Barksdale?

A. Yes, sir.

Q. You were sick in the fall when you filed your lawsuit, weren't you?

168 A. Sometime in that year I was.

Q. Were you sick in the first part of October, 1932?

A. Yes, sir.

Q. How long had you been sick then?

A. I don't recall exactly the days.

Q. Do you recall writing the company a letter addressed to Mr. Williams that on account of your physical condition you could no longer perform the duties of switchman and asked for a switchtender job?

A. I recall writing the letter, yes, sir.

Q. Do you know what the date of that letter was?

A. Not exactly.

Q. Wasn't it on September 7, 1932?

A. Yes, sir; I think it was.

Q. Look at this letter and see if that is not it?

A. Yes, sir, that is it.

By Mr. Byrd:

We desire to introduce the letter of September 7, 1932 in evidence as DEFENDANT'S EXHIBIT "1" to the testimony of Mr. Moore:

169 Jackson, Miss., September 7, 1932.

Mr. T. K. Williams, Trainmaster,
Jackson, Miss.

Dear Sir:

Due to the fact that my health will not permit me to resume work as a switchman, I would like to be permitted to occupy position of switchtender, theird trick, Jackson, Miss. yard.

If possible, I would like for you to handle this as promptly as possible and would appreciate your decision before October 10th, 1932.

Yours truly,
EARL MOORE,
Switchman.

Q. Why did you put that deadline of October 10, 1932?
A. For no reason. I just put it there.
Q. Isn't it a fact that you wanted a report be-
170 fore you filed a lawsuit against the company?
A. No, sir, not necessarily. It wasn't necessary.
Q. But you did file your lawsuit about the 15th of October, 1932?
A. The 15th or 17th.
Q. And you asked for this letter by October 10, 1932? You didn't tell Mr. Williams that if he didn't give you this job you were going to file this lawsuit and undertake to get your seniority raised?
A. No, sir.
Q. But you did give a deadline of October 10 when you wanted a reply to this letter?
A. Yes, sir.
Q. How long had you been sick prior to September, 1932?
A. I just don't know off hand.
Q. The contract that you introduced in evidence, that is the contract on which you are suing in this case?
A. Yes, sir.
Q. That is the only contract you have with the company,—with the Illinois Central Railroad Company?

By Mr. Potter:
We object because that is a conclusion of law.

171 By the Court:
I will overrule the objection.

Q. This so-called schedule of railroad rules is what you base your lawsuit on?

A. Yes, sir.

Q. That is the only contract of employment you have with the Illinois Central Railroad Company?

A. Yes, sir.

Q. Look at that. It is a little different book but I want you to see if it is the same contract?

A. Yes, sir, I know it is.

Q. The man next to you on the seniority list as you have testified was H. H. Cutler, and your contention is that on account of the fact that you are senior to Cutler, that every day that Cutler worked, if you had been on the seniority roster and had been employed, you would have been able to work?

A. Yes, sir.

Q. But you don't say you would have worked every day?

A. I think I would. I haven't been sick.

Q. You weren't sick in 1927 were you?

A. Sometime in that year I was.

Q. You weren't sick in 1928, were you?

A. Yes, some of it.

Q. You weren't sick in 1929, were you?

A. The days I was off I was sick, other than a few days that I would go bird hunting.

Q. Every day you were off you were sick?

172 A. No, sir, not every day.

Q. I want to ask you now about this question of employment. Do you know whether or not there is an agreement entered into between the Railroad and the Brotherhood of Yardmen and Switchmen respecting the number of hours that a switchman can work a month?

A. Now it is.

Q. How long has that been in force?

A. I think in 1934.

Q. What is the maximum number of hours?

A. Twenty-six days.
Q. At eight hours?
A. Yes, sir.
Q. You are now getting $105.00 per month?
A. Yes, sir.
Q. And have been drawing that since 1936?
A. Yes, sir.
Q. Are you under civil service?
A. Yes, sir.
Q. You are a civil service employee of the government at this time?
A. Yes, sir.

173 Re-Direct Examination.

By Mr. Potter:

Q. Do you know of your own knowledge whether or not at that conference in Jackson attended by Mr. Jackson, who was the general chairman of the Grievance Committee of the I. C. R. R. Co. and company officials, at which the consolidated roster of 1927 was promulgated, Mr. McGee, the local chairman, and Mr. Dundes, the general chairman, attempted to sit in at that meeting? Do you know that of your own knowledge or not?
A. Yes, sir.
Q. Were they permitted to do it?
A. No, sir.
Q. Now, from the time that you went to work for the I. C. R. R. Company, at least up until the date of the consolidated roster, in the West Yard they were using the roster promulgated by whom?
A. The Switchmen's Union of North America, and the Alabama & Vicksburg Railroad Company.
Q. What rates of pay did you get and it was fixed by what contract?
A. Switchmen's Union of North America.

Q. Mr. Byrd asked you whether or not you took it up with the Switchmen's—no, with the Brotherhood of Railroad Trainmen, seeking to have your rights vindicated, and you stated that you did not. Please state whether or not it is a fact that every man you would have displaced was a member of the Brotherhood of Railroad
174 Trainmen and you were seeking under another contract?

A. Yes, sir.

Q. Now, you stated that this matter went clear to the Labor Board. Through what representative and under what contract were these matters brought before the Labor Board?

A. Switchmen's Union of North America.

Q. By the officials of the Switchmen's Union of North America?

A. Yes, sir, and the I. C. Railroad Company.

Re-Cross Examination.

By Mr. Byrd:

Q. You were a member of the Brotherhood of Railroad Trainmen in 1927?

A. Yes, sir.

Q. So any request or any action taken by the Brotherhood of Railroad Trainmen in 1927 would have been taken at your request as a member of the Union, as well as for the benefit of the other members of the Union?

By Mr. Potter:

We object.

175 By the Court:

Objection overruled.

A. Yes, sir.

Q. You state now that you never saw or heard of a written rule of the I. C. Railroad Company other than the

ones that you introduced in evidence. Did you ever hear of any unwritten rules of the I. C. Railroad Company?

A. No, sir.

Q. Did you ever hear anyone say that it was a rule of the I. C. Railroad Company that whenever a man filed a suit against it he was automatically discharged?

A. No, sir.

Q. You never heard that mentioned any time or place?

A. No, sir.

Q. When was the first you ever heard of that?

A. I never heard it.

Q. Didn't you read the pleadings in this case?

A. The first time I ever heard it was in the pleadings.

Q. Why did you ask Mr. Walker if he was discharging you for filing the lawsuit?

A. That is the only reason I knew he could discharge me.

Q. That was the only reason he could discharge you?

A. Yes, sir.

Q. In the transcript of the hearing that was held in Mr. Williams office by Mr. J. T. Walker, Superintendent, you asked Mr. Walker if he would give you a letter stating the reasons for your discharge. I want to ask you if he did give you any such letter?

176 A. Yes, sir.

Q. I now present to you a letter dated February 20, 1932 from Mr. J. F. Walker to you. I want to ask you if you ever received that letter?

A. Yes, sir.

Q. "Jackson, Mississippi, February 20, 1932. Mr. Earl Moore, Jackson, Mississippi. Dear Sir: Referring to my letter of February 15 and your letter to me dated February 17 asking for the hearing which was held in the Trainmaster T. K. Williams' office at 4:00 P. M., February 20, 1932. As I advised you in this meeting, the cause for you being dismissed from service was on account of unsatis-

factory employment. Yours truly, J. F. Walker, Superintendent."

A. Yes, sir.

177 A. E. McGHEE, witness for plaintiff, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. You are employed at present by the I. C. Railroad Company as switchman?

A. Yes, sir.

Q. And have been so employed since the I. C. Railroad leased the Y. & M. V. Railroad Company?

A. Yes, sir.

Q. And prior to that time you were working for Alabama & Vicksburg Railroad Company and the Switchmen's Union of North America had a contract with the Alabama & Vicksburg Railroad Company?

A. Yes, sir.

Q. What position, if any, did you hold in the local lodge of the Switchmen's Union of North America?

A. I was the local chairman. The man who handled all the complaints.

Q. As local chairman was it your duty to take up in behalf of the members of your lodge any grievance that the individuals had with the management?

A. Yes, sir.

Q. Did that local lodge continue in existence after the lease of the Y. & M. V.?

178 A. For a short time.

Q. It continued in existence right on up until and after the promulgation of the consolidated roster?

A. Yes, sir.

Q. As local chairman did you receive any communication from the Railroad Company that the question of the consolidation of the two yards was to be heard in Jackson?

A. No, sir.

Q. Did you know that such was to occur?

A. Only by conversation with other men.

Q. Did you know Mr. Jackson?

A. Yes, sir.

Q. What position, if any, does he hold with the Brotherhood of Railroad Trainmen?

A. He was at that time general chairman of the I. C. System.

Q. Did you know that Mr. Jackson and other members of that general committee were in Jackson with a view to consolidating the two rosters in the Jackson yards at the time they did meet there?

A. That was the information I got.

Q. Where was that meeting had?

A. They held a meeting practically every day,—once and twice a day,—in the private car.

Q. On behalf of the members of the local lodge of the Switchmen's Union of North America, please tell the Court whether or not you attempted to sit in on that meeting?

A. I got in communication with my general
179 chairman and he instructed me to ask to sit in.

Q. Did you request to sit in?

A. As soon as I received the communication I went directly to the car and asked for Mr. Jackson. He came to the door and I told him who I was and I requested to sit in and he said unless I was a member of the Brotherhood of Railroad Trainmen I couldn't come in.

Q. You were not a member at that time?

A. No, sir.

Q. Do you remember the occasion when they consolidated the roster and published it?

A. Yes, sir.

Q. What steps in your official capacity as general chairman of the local lodge of the Switchmen's Union of North America did you take, and if you did take any steps, how soon after you saw the consolidated roster did you take them?

A. I immediately contacted the general yardmaster and he notified me that morning that we were not employees as far as any old age was concerned and to go to the Board and see where we stood. I asked Mr. Harding not to force that Board to place us there until I could hear from the Grand Lodge, and he said that was final and the least we had to say about it the better off we would be if we expected to stay there.

Q. That was the general yardmaster at Jackson, who has since died?

A. Yes, sir.

Q. After that who did you take it up with?

A. Mr. Ed McLauren. He was superintendent
180 at the time and he told me he had no authority to do anything with it at all. So we arranged a meeting with the Vice President, Mr. L. Canon, and myself and we had that meeting in New Orleans. He told us that as far as that was concerned, it was all over.

Q. Did you take it up with any other officials?

A. Mr. Patterson.

Q. Who was he?

A. General Manager of the I. C.

Q. Where?

A. Chicago.

Q. Did you get any relief there?

A. No, sir, he turned it down, so I carried it to the Board,—the Labor Board.

Q. Did you take that up with these various parties as an individual or as chairman of the local lodge?

A. As local representative I took it up with all the officials of the Railroad Company that I could contact and get anything from.

Q. At that time Mr. Moore was a member of the local lodge of the Switchmen's Union of North America?

A. Yes, sir.

Q. That was your duty under the constitution of the Switchmen's Union of North America?

A. Yes, sir.

181 Cross Examination.

By Mr. Byrd:

Q. How soon after this roster was promulgated was the objection made by you to Mr. Cannon?

A. The objection was made to me the same day.

Q. Made to you by the men, but I am talking about how soon after it was made by you to Mr. McLauren?

A. Well, I couldn't give the definite date.

Q. Have you any idea how soon it was?

A. I think it was about three weeks before I contacted him.

Q. Mr. McLauren referred you to Mr. Hevron, the New Orleans Superintendent?

A. No, Mr. McLauren said he had no authority.

Q. You went to Superintendent Hevron?

A. Yes, sir.

Q. He was general superintendent of the Southern lines and he saw you in New Orleans?

A. Yes, sir.

Q. Were you satisfied with what took place, or did you go to Mr. Patterson after Mr. Canon?

A. No, sir.

Q. You don't know what Mr. Canon did of your own knowledge?

A. Only from correspondence.

Q. You don't know what action was taken by the Labor Board on the matter?

A. Yes, sir, I know. I was posted on every
182 move. The case never was heard.

Q. Was it a joint hearing at the request of the Brotherhood and the management, or was it an ex parte petition of the Brotherhood?

A. The members in Jackson had appealed through me to the Grand Lodge—

Q. I am talking about the case that was brought before the Labor Board. Was it brought at the joint request of the management and representatives of the Union, or simply at the request of the Union?

A. I couldn't answer that.

By Mr. Potter:

Plaintiff rests.

183 By Mr. Byrd:

We desire to make a motion to exclude the evidence offered by the plaintiff and ask that the Court enter a judgment for the defendant for the reason that the contract sued on is not shown to have been breached.

By the Court:

I am going to reserve ruling on that motion. If there had been no contract, then they can discharge him without cause, but as I understand the decision of the Supreme Court of Mississippi, there is a contract and he cannot be discharged except for cause as long as that contract is in existence. All the contract provides is how an employee who may have been discharged or suspended may proceed to cause himself to be reinstated, yet he also has the right to pursue another remedy, and if the discharge was without just cause, then there would be a breach of the contract, for which he could sue. That is the way I understand it now. I am not going to make a definite ruling, however, and will reserve ruling on the motion.

184 T. K. WILLIAMS, witness for Defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Jackson, Mississippi.

Q. By whom are you employed?

A. I. C. Railroad Company.

Q. In what capacity?

A. Trainmaster.

Q. How long have you been trainmaster with the Illinois Central?

A. Fifteen years.

Q. How long have you been trainmaster at Jackson?

A. I had supervision over this territory in 1926.

Q. You were living at McComb at that time?

A. In February, 1930 I went on the South end and was relieved by Mr. Snyder and transferred back up there on September 15, 1931. I was about eighteen months out of this territory.

Q. As trainmaster, what, if anything, did you have to do with the Jackson, Mississippi yards of the Illinois Central Railroad?

A. The employees at Jackson were under my supervision. Bob Harding was general yardmaster and he had an assistant yardmaster under him.

Q. They reported to you?

185 A. Yes, sir.

Q. They were in immediate charge of the operation of the Yard in so far as the switchmen were concerned?

A. Yes, sir.

Q. You know the plaintiff, Earl Moore?

A. Yes, sir.

Q. How long have you known him?

A. Ever since we took the A. & V. over. July, 1926. I met all the men then.

Q. Did you receive any reports from Mr. Harding with reference to the work done by Mr. Moore?

A. Well, he would complain because he wouldn't work.

By Mr. Potter:

We object to that because it is hearsay. This man can't state what somebody else told him.

By the Court:

I will permit him to answer as to whether he got any reports. As to what they were, that will present another question.

Q. Did you or not get any reports from Mr. Harding as to Mr. Moore's work?

A. Yes, sir.

Q. Did those reports come from Mr. Harding
186 indicating that Mr. Moore was an efficient employee or a non-efficient employee?

By Mr. Potter:

We object.

By the Court:

I will sustain the objection unless it is in writing.

By Mr. Byrd:

They are not in writing.

By the Court:

I will sustain the objection.

Q. State whether at any time you had any complaint from Mr. Harding or anyone else as to Mr. Moore laying off from his job and not working when the work was available?

By Mr. Potter:
We object.

By the Court:
I am going to let him answer that as to whether he received any reports, but as to what were in those reports, it would have no probative force.

A. I did.

187 By Mr. Potter:
As I understand the Court's ruling, it is just that he received the report, and anything else will be excluded?

By the Court:
Yes, sir.

Q. As a trainmaster with supervision of the Jackson, Mississippi yard was it or not your duty to keep in contact with the operations in the yard and to inform yourself as to the efficiency of the various switchmen and yardmen employed in the Jackson yard?

A. I did that.

Q. Did you do that with reference to Earl Moore?

A. I observed his work when he worked.

Q. Did you observe whether or not he worked regularly?

A. He did not.

Q. Do you know why he didn't work regularly?

A. No, sir.

Q. Do you know whether or not he was sick at the times when he wasn't working regularly?

A. I do not.

Q. At the time that he was not working regularly, when he would lay off and come back, what was his appearance as to whether he was sick or well?

A. Well, I assumed that he was well, because if he was off sick he would have to get a leave of absence from me and he didn't have that.

188 By Mr. Potter:

We object.

By the Court:

I will sustain the objection as to what he assumed.

Q. Were you there at Jackson when the A. & V. Railroad Company was leased by the I. C.?

A. I was.

Q. Were you there when the consolidated roster was made for the two yards?

A. I was.

Q. Did Mr. Moore, or anyone for him, make any complaint to you about the publication of that roster?

A. They did not.

Q. Were you the proper officer to whom the complaint should be made?

A. I was.

Q. Did Mr. Moore continue to work under that roster as published?

A. Yes, sir.

Q. How long did he work under it?

A. Before we received the complaint about five and a half years.

Q. What was the first you knew of his complaint?

A. I don't know that he ever complained to me about the roster.

Q. Do you know whether he did or didn't complain to you?

189 A. He did not.

Q. When did you first hear that he was complaining of the roster? Was it when the suit was filed or when?

A. When I had information about the suit. I don't know at that time that I knew what the suit was about, but I heard he indicated that it was something pertaining to his seniority and he went to Chicago and came back and told me something about going to get his full seniority and I said to him "I don't see how you can do that under the contract with the employees made between the company and the switchmen, after a lapse of five years after the meeting the Railroad management had with the Brotherhood of Railway Trainmen."

Q. State whether or not the service of Earl Moore was satisfactory to the I. C. Railroad Company during the time that he was employed?

By Mr. Potter:

I would like for the Court to advise the witness that he can testify only from what he knows of his own knowledge.

By the Court:

Yes, no witness can testify to things he does not know of his own knowledge.

Q. Was he or not a satisfactory employee?

A. No.

190 Q. How long have you been working for the I. C. Railroad Company?

A. Thirty-six years.

Q. Do you know whether or not it is a rule of the I. C. Railroad Company that a man working for them who files suit against them is discharged?

A. That is the policy of the Railroad.

Q. How long has it been the policy of the Railroad?

A. Ever since I have been working for them.

By Mr. Potter:

Under the last answer we move the Court to exclude the question of policy from the record.

By the Court:

I will overrule the motion and hear the matter out on argument.

Q. Is it or not a rule of the I. C. Railroad Company, or was it a rule at the time Moore filed this suit?

A. It was.

Q. How did you find out what that rule was?

A. Well, it just always has been my understanding that if you sued the Railroad you lost your job.

Q. That has been the policy in the past?

A. Always.

Q. Do you know of instances where an em-
191 ployee has sued the Railroad and not been discharged?

A. No, sir, I do not.

Q. Mr. Moore, as shown by the record, was off for considerable time in 1931 and 1932. I believe he was discharged in 1933. Do you know whether or not he had leave of absence during that time or not?

A. He did not the first six months.

Q. Did he have it for the second six months?

A. He got that through the hospital department and not through me.

Q. Did he ever request it of you?

A. No, sir.

Q. Do you know if one was given him or not?

A. The second one I say the doctor did.

Q. What was the date of that second leave of absence?

A. July 27, 1932.

Q. For how long a period was it?

A. Six months.

Q. That would make it expire when?

A. January 27, 1933.

Q. Did Earl Moore present himself for work or re-employment to you on or prior to January 27, 1933?

A. Yes, sir, he came to see me and asked about a switchtender job.

Q. Is that the letter where Mr. Moore said he was physically unable to perform the duties as switch-
192 man?

A. Yes, sir.

Q. I am talking about when, with reference to the leave of absence and January 27, 1933 did he present himself to go back to work as switchman?

A. On February 2, 1933,—five days after his leave expired.

Q. Has the I. C. Railroad any rule with reference to leaves of absence?

A. They have.

Q. Are those rules in writing?

A. Yes, sir.

Q. What are they?

A. In so far as the trainmaster is concerned, is that what you want?

Q. Yes.

A. The trainmasters are permitted to grant a leave of absence up to six months to an employee. After that he should report to the I. C. Hospital in New Orleans. If they find him in such physical condition as to warrant further leave, they will recommend same to Dr. Dowden, who in turn recommends additional leave to the superintendent. When granting leave we send a copy of the letter to the superintendent of the department where the service record is posted and it is carried on the pay roll with notation as to leave. Those are my instructions.

Q. What rules do they have governing the men? The rules that are given to the men?

A. The contract between the employees and
193 the Railroad,—that is, between the Switchmen and the Railroad, providing that they only be given 90 days unless he is sick or serving on a committee.

Q. He did have a leave from July 27, 1932?

A. Yes, sir.

Q. And prior to that he had no leave of absence at all?

A. No, sir.

Q. And after he returned to work the six months had expired?

A. Yes, sir.

Q. That is provided by Article 14, Section C of the contract between the Switchmen and the Brotherhood of Railroad Trainmen?

A. That is a fact.

Cross Examination.

By Mr. Potter:

Q. I assume you want to be perfectly fair about this matter. Doesn't Mr. Moore efficiency record furnished by the Railroad in response to interrogatories at the first trial show that Mr. Moore was granted a further leave of absence on August 3, 1932?

A. By the Hospital department.

Q. That leave of absence would not expire until February 3, 1933?

A. The leave dates from January 27, 1932.

Q. And it was five days after he reported back
194 from his leave of absence?

A. For duty as switchman.

Q. In that time he was not called, was he?

A. Well, we had ample men. It was not necessary. He is supposed to report when he is ready for duty. We don't call switchmen when they are off.

Q. Was there any man during that five days that had a lower number that was called?

A. We don't call switchmen. They report to the Board at 7 o'clock in the morning and receive the work that is available and take their places in accordance with seniority.

Q. Did any man who had a number lower than Moore work between the 27th day of January and the 2nd day of February, 1933?

A. That would have to be checked by the payroll.

Q. You don't know of any such man?

A. No, I wouldn't know.

By the Court:

Before we go any further, that leave of absence was July 27, 1932.

Q. You stated that you did not know any person or any employee who had ever filed a lawsuit against the Railroad who was not discharged. I want to ask you
195 this question. Who do you know that was ever fired for filing a lawsuit up until the time that Mr. Moore was discharged?

A. I had never known of any bringing suit.

Q. You have a printed book of rules, do you not?

A. Yes, sir.

Q. The Railroad Company promulgated rules and there is a rule book that has been introduced in evidence as Exhibit "H" to the testimony of Mr. Moore?

A. It has his name, but it was furnished to Mr. Gordon.

Q. But this is the book of rules?

A. Yes, sir.

Q. There is no rule in that printed book of rules that any employee filing a lawsuit would be discharged, is there?

A. No, sir.

Q. Those rules are to operate the railroad by and not to discharge the employees?

A. Yes, sir.

Q. You stated that Mr. Moore was an unsatisfactory employee. Of your own personal knowledge why do you state that?

A. After taking the A. & V. Railroad over, those men being strangers to me and they began working in the I. C. Yard, I naturally would observe their work when I was around Jackson, which was two or three days a week. Bob Harding, now deceased, was general yardmaster and would point out the different ones and he has complained of this fellow working so slow and remarked—

196 By Mr. Potter:
We object to what Mr. Harding said.

By the Court:
Objection sustained.

A. He would move rather slow going to switch and would slow up the work.

Q. How many times have you seen Mr. Moore moving slow going to switch and slowing up the work?

A. I couldn't answer that. Most all the time I ever saw him work he worked rather slow.

Q. Did you see him right from the beginning at intervals and on up to the time that he was discharged moving slowly?

A. At intervals.

Q. Was there anything else that you observed and know of your own knowledge other than moving slowly?

A. He wouldn't work when work was available.

Q. There were plenty of men on the board at that time to work?

By Mr. Byrd:
We object.

By the Court:
Objection sustained.

197 By Mr. Potter:

I want to show that there were men willing to take Mr. Moore's place on the extra board.

By the Court:

I don't think that would be material.

Q. Did that start from the beginning?

A. I beg your pardon.

Q. Did that conduct on the part of Moore start from the beginning of the time I. C. took over the job,—not working regularly?

A. I don't know anything about his practice when he worked for A. & V.

Q. I said from the time I. C. took over the yard?

A. He didn't work regularly.

Q. The Railroad Company knew that from 1926 until 1933 that he wasn't working regularly?

A. The last day he worked was January 3, 1932.

Q. They knew that during that whole period?

A. Yes, sir.

Q. They knew he was moving slowly going to the switch job during that whole period?

A. Yes, sir.

Q. But they didn't fire him until after he filed this lawsuit, did they?

A. The Railroad Company does everything it
198 can to keep from firing their employees. It is our policy to put up with them and to educate them to be efficient and good employees and citizens. We are not picayunish with them. There are lots of things we might fire them for, but we don't do that.

Q. I said, notwithstanding that knowledge during that period of five years Moore was not discharged until a few months after he filed this lawsuit, was he?

A. He was fired February 15. I can't say when he filed the lawsuit.

Q. As a matter of fact, don't you know that he was discharged because he filed the lawsuit?

A. The Superintendent dismissed him.

By Mr. Byrd:

It is admitted in the pleadings that that is one of the reasons he was discharged.

Q. There is no regulation under the contract requiring you to give a switchman of longer seniority than another switchman the job as engineer foreman unless that man deserves the promotion, is there?

A. They take their turn. I think all of our men were promoted to engineer foremen and worked in accordance with seniority. The A. & V. didn't do that. They picked out different men. The I. C. gave each man his turn.

Q. In 1930, and sometime after February 13, 199 you yourself promoted Mr. Moore to the job as engineer foreman, didn't you?

A. He came over from A. & V. as helper and I don't recall. I would have to look at the records to see whether or not I examined him to promote him as engineer foreman.

Q. Referring to the efficiency record, he was examined for the job of engineer foreman on February 13, 1930, was he not?

A. Not by me.

Q. He was examined?

A. The record shows that.

Q. If he was promoted to the job of engineer foreman, it was done, if not by you, at least with your knowledge, consent and acquiescence?

A. It was not. I was not trainmaster there at that period. Mr. Snyder was, and he evidently examined Mr. Moore and not me.

Q. In February, 1930 you were not trainmaster there?

A. I came back in 1931. I would have to look at the records to be positive.

200 G. G. DOWDALL, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Chicago.

Q. By whom are you employed?

A. I. C. Railroad Company.

Q. Do you have charge of the I. C. Railroad Company Hospital in Chicago?

A. Yes, sir.

Q. How long have you had charge of it?

A. Since 1916.

Q. Do you know the complainant in this case, Earl Moore?

A. Yes, sir.

Q. Was he ever a patient in the I. C. Hospital in Chicago?

A. Yes, sir.

Q. When?

A. August 5, 1931.

Q. To when?

A. Just August 5, 1931.

Q. When was he next a patient?

A. January 5, 1932.

Q. How long was he there then?

A. January 9, 1932.

Q. Was he discharged from the hospital on
201 January 9, 1932?

A. Yes, sir.

Q. What was his physical condition as to whether he was able to return to work at that time?

By Mr. Potter:

We object to the doctor testifying because the relation of physician and patient exists.

By the Court:

I will sustain the objection.

Q. When did he next return, if he did return?

A. July 27, 1932.

Q. Now, on July 27, 1932, what if anything was done by you with reference to a leave of absence for Mr. Moore?

A. I recommended that he be granted a six months leave of absence on account of his physical condition.

Q. Do you know whether or not, of your own knowledge, that was granted?

A. I know it was granted.

Q. Was he back in the hospital any more?

A. I think that was the last time he was in the Chicago hospital.

Q. Prior to July 27, 1932 had you seen Mr. Moore?

A. I saw him when he was at the Chicago hospital at the previous admittance.

Q. Did you or not give him a discharge or give a letter to anyone in regard to giving him a discharge?

202 A medical discharge?

A. January 9, 1932. He was given an order to Dr. Womach and Dr. Womach was directed to return him to work.

Q. What position does he occupy with the I. C. Railroad Company?

A. On our consulting staff at Jackson and had been taking care of Mr. Moore.

Q. At the time that you wrote this letter to Dr. Womach directing that he be discharged as able to go to work, what was Mr. Moore's physical condition?

By Mr. Potter:

We object to this because the relation of physician and patient exists.

By the Court:

If he knows it by virtue of his examination and treatment of him as a doctor, I sustain it. If he knows it independent of that, he can testify.

Q. Do you know other than by your treatment what his physical condition was?

A. I know by the examination we made at Chicago Hospital what his condition was.

Q. Did you know it independent of that?

A. I did not examine him myself.

Q. Did you see him?

203 A. Yes, sir, I saw him.

Q. You didn't examine him?

A. No.

Q. From what you saw of him, what would you say as to whether he was in condition to go back to work?

A. He was able to go back to work in my opinion.

204 F. A. TYSON, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Memphis.

Q. By whom are you employed?

A. I. C. System.

Q. In what capacity?

A. Timekeeper.

Q. As such, what, if anything, do you have to do with the records of the I. C. Railroad Company showing the time made and the amount of money paid to switchmen in the Jackson, Mississippi yard?

A. I have charge of that.

Q. I hand you a statement which I would like for you to examine and tell me what it is?

A. It is a statement of the time performed by switchman Earl Moore from November, 1926 through February, 1932.

Q. 1932 or 1933?

A. 1932.

Q. Where did you get the information from which you made up this statement?

A. From the time books prepared each pay roll period.

Q. Is this statement correct?

205 A. It is true to the best of my knowledge.

Q. Will you make that an exhibit to your testimony?.

A. Yes, sir.

By Mr. Byrd:

We desire to introduce this statement as Exhibit "A" to the testimony of Mr. Tyson.

BLANK PAGE

DEFENDANT'S EXHIBIT "A"—Tyson.

Statement of Time Made and Wages Earned by Earl Moore, Employed as Switchman by IC RR at Jackson, Miss., November 11, 1926, to Dec. 31, 1932, Incl.

		1926		1927		1928		1929		1930		1931		1932	
		Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount
Jan.	A			9	$56.71	..	....	11	$72.82	7	$46.59	..	....	1	$ 7.61
	B			2	13.47	..	....	11	73.07	6	45.67	..	....	6	42.94
Feb.	A			1	6.16	..	....			8	52.96	4	28.09	..	....
	B			1	6.16	..	....	7	46.34	12	80.18	2	13.49	..	....
Mar.	A			6	39.04	..	....	15	104.63	14	97.56	3	19.86	..	....
	B			13	83.20	..	....	12	80.68	15	99.92	15	100.66	..	....
Apr.	A			15	95.05	..	....	15	99.30	7	47.58	5	33.62	..	....
	B			10	62.29	2	13.24	14	93.67	14	103.10	5	33.62	..	....
May	A			10	63.56	15	99.82	15	101.21	14	93.05	4	27.47	..	....
	B			..	....	16	106.17	14	96.92	12	81.18	7	46.34	..	....
Jun.	A			1	6.16	10	66.45	13	87.10	14	93.18	5	33.97	..	....
	B			8	50.20	7	47.36	12	79.44	7	46.96	1	6.62	..	....
Jul.	A			1	6.62	4	26.85	13	87.30	13	86.56	3	20.11	..	....
	B			2	13.24	1	6.62	11	73.32	10	77.66	..	....	..	....
Aug.	A			10	70.54	1	6.62	1	6.62	..	....	..	....	..	....
	B			6	41.46	5	33.47	7	46.34	4	27.97	..	....	..	....
Sep.	A			12	82.66	4	26.48	4	29.08	9	60.60	..	....	..	....
	B			7	50.93	14	94.17	12	90.54	11	74.93	..	....	..	....
Oct.	A			13	86.56	7	47.08	12	83.06	3	20.11	..	....	..	....
	B			1	6.62	4	29.83	15	111.88	7	46.34	..	....	..	....
Nov.	A			3	19.86	10	66.82	8	58.94	1	6.62	..	....	..	....
	B	1	$6.16	5	33.10	5	33.10	..	....	..	....	..	....	..	....
Dec.	A	1	6.16	12	80.46	12	80.31	..	(Short)	..	....	..	....	..	....
	B	..	....	2	13.76	3	20.60	..	(Oct.)	1	6.62	..	....	..	....
		2	$12.32	150	$987.81	120	804.99	222	$1,522.26	189	$1,295.34	54	$363.85	7	$50.55

207 Q. Now, what is that document I hand you?

A. That is a statement of time performed by switchman H. H. Cutler for the period January 1, 1933 through October 15, 1938.

Q. Where did you get the information from which you made up that statement?

A. From the time books prepared from each payroll period.

Q. The I. C. Railroad books?

A. Yes, sir.

Q. Is that statement correct?

A. It is.

By Mr. Byrd:

We desire to offer this statement in evidence as EXHIBIT "B" to the testimony of Mr. Tyson.

(This Exhibit has already been copied as Exhibit "J" to the testimony of Moore, page 122 hereof). (This Exhibit "B" to Tyson, however, has a figure thereon in green ink, evidently the total, of 10764.24).

Q. What is this document I hand you?

A. This is a statement of the time earned by switchman H. H. Cutler from November, 1926 through December, 1932.

Q. Did you secure that information from the same source?

A. Yes, sir.

Q. Is that correct?

A. It is.

By Mr. Byrd:

We desire to introduce this statement as Exhibit "C" to the testimony of Mr. Tyson.

BLANK PAGE

DEFENDANT'S EXHIBIT "C"—Tyson.

Statement of Time Made and Wages Earned by H. H. Cutler, Employed as Switchman by IC RR at Jackson, Miss., Nov. 11, 1926 to Dec. 31, 1932, Inc.

		1926		1927		1928		1929		1930		1931		1932	
		Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount
Jan.	A			10	88.31	10	71.40	15	108.32	11	78.94	13	93.07	..	....
	B			13	112.34	14	99.96	12	84.64	9	64.04	12	84.78	7	47.63
Feb.	A			13	118.32	13	92.80	14	102.14	13	95.10	14	96.72	1	5.96
	B			10	89.18	11	78.81	13	92.33	12	90.92	12	84.39	1	6.07
Mar.	A			12	104.95	13	92.82	13	96.04	15	111.69	11	74.08	9	54.09
	B			14	120.85	13	95.45	16	125.78	14	106.54	11	71.68	12	72.88
Apr.	A			13	106.74	11	79.48	13	120.02	13	104.34	14	97.85	4	24.97
	B			12	101.47	13	94.16	15	111.52	13	101.93	12	83.78	3	18.21
May	A			12	99.85	13	94.03	14	101.30	13	93.22	12	83.38	2	11.92
	B			10	80.10	13	94.70	10	74.08	3¾	26.93	15	100.59	1	7.18
Jun.	A			11	95.57	11	81.62	14	100.38	7	46.86	9	61.32		
	B			13	104.62	13	94.83	13	94.31	14	95.56	8	53.08		
Jul.	A			12	103.23	10	72.87	7	49.98	14	96.45	14	96.50		
	B			11	90.60	12	86.62	16	114.54	15	108.60	11	75.94		
Aug.	A			12	96.00	14	99.96	12	87.96	15	103.07	7	48.97		
	B			13	112.25	14	100.50	14	100.90	16	112.41	6	50.16		
Sep.	A			12	111.41	16	114.39	13	95.67	15	112.95	4	27.00		
	B			11	98.64	14	101.97	15	111.94	15	113.13	13	88.27		
Oct.	A			12	86.88	12⅝	94.83	15	114.90	14	105.49	15	106.98	14	88.96
	B			11	78.54	16	115.61	15	129.34	16	119.57	13	103.94	12	73.79
Nov.	A	4	36.52	12	86.13	14	100.78	10½	93.06	14	100.96	12	91.98	14	84.82
	B	12	124.50	11	79.34	15	107.68	12	88.23	15	111.25	10	69.98	12	73.41
Dec.	A	12	116.16	13	93.49	14	101.20	12	88.09	14	102.79	10	66.32	11	69.69
	B	12	112.05	12	86.48	11	79.34	11	83.36	4	29.35	5	33.87	4	24.39
Total		40	389.23	285	2345.29	310	2245.81	314	2368.83	304	2232.09	263	1844.63	107	663.97

209 Cross Examination.

By Mr. Potter:

Q. Are you familiar with the seniority roster in Jackson prior to February 15, 1933?

A. Yes, sir.

Q. You are familiar with the contract with the switchmen?

A. No, sir.

210 T. S. JACKSON, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. At Lincolnshire, Illinois,—a suburb of Chicago.

Q. What, if any, connection do you have with the Brotherhood of Railroad Trainmen?

A. Chairman of the grievance committee for the Brotherhood.

Q. How long have you held that position?

A. Since January, 1920.

Q. Are you the same T. S. Jackson that signed the schedule of wages and rules which is in evidence in this case?

A. I have signed every schedule of wages and rules since 1920.

Q. This is the document we are talking about.

A. Yes, sir, I signed that.

Q. In the negotiations leading up to the making of that contract, did you or not represent the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. How long have you been familiar with the operations of the Illinois Central Railroad Company?

A. I went to work in September, 1906 in the Kentucky Division and was elected local chairman for the Trainmen in that Division in 1909 and took office January, 1910 and have been a member of the Committee since that time.

Q. During the time that you have worked for
211 the I. C. Railroad Company and the time when you were connected with the Brotherhood of Railroad Trainmen, state, if you know, what the rule of the I. C. Railroad Company has been with reference to the discharge of employees who entered suit against that Railroad?

By Mr. Potter:

We have heretofore objected to this line of questioning. Is there any necessity for renewing our objection?

By the Court:

It might be best to raise your objections as we go along.

By Mr. Potter:

We object to this testimony for the reason that it is an attempt on the part of the defendant to amplify and vary the terms of the written contract.

By the Court:

I will overrule the objection.

Q. You say you are familiar with that rule?

A. It has been the policy of the I. C. Railroad Company to discharge its employees who brought suit.

Q. How long has that been its policy?

A. Since my connection with the company in 1906.

Q. Did you know that was its policy when this contract that has been made a part of the evidence was entered into?

A. To the same extent that I am today.

212 By Mr. Potter:

We move to exclude the testimony in regard to all that.

By the Court:

I will overrule the objection.

Q. I believe you were representing the Brotherhood of Railroad Trainmen in Jackson when the management agreed with the Brotherhood of Railroad Trainmen on the consolidated seniority roster in the Jackson, Mississippi Yard. Were you or not? In 1926, I believe it was.

A. The reason I am hesitating to answer that is there were two consolidations, one of the G. & S. I. and one of the A. & V.

Q. Were you present when Mr. Earl Moore was given a place on the consolidated roster?

A. Yes, sir.

Q. Who took part in that conference?

A. We drafted one in the general committee in 1926 and on November 12 we met Mr. Hevron, who had authority to speak for the general manager and reached an agreement on the subject.

Q. Why were you present representing the men?

A. For the reason that our Brotherhood holds a contract and has held a contract since 1890 with
213 the I. C. Railroad for the men employed in the train and yard service.

Q. Does that include the Jackson, Mississippi, yards?

A. Yes, sir.

Q. At that time do you know whether or not what was formerly the A. & V. Yard, the West yard in Jackson,

had been abolished in so far as operation of the work was concerned?

A. It had been at that time to a certain extent. In other words, there was an intermingling of work between the old A. & V. and I. C. Jackson, Mississippi, yards.

Q. What about the meeting where you agreed on this consolidated roster? What started that meeting?

A. The insistence of the Jackson, Mississippi, I. C. Yardmen that something should be done to arrange an agreement in connection with the joint work.

Q. At the meeting, as I understand it, it was agreed that the two oldest A. & V. men would be given their actual seniority on the list and that the remainder of the A. & V. switchmen would be put in on the roster on the ratio of one A. & V. man to five I. C. men?

A. No, I think the agreement reached was that the two senior A. & V. men would be given their original service and placed on the I. C. list as of the day and date they entered service and that the two junior A. & V. men would be placed at the foot of the list, and that the balance of the A. & V. men would be put on at the ratio of four to one.

214 Q. When they put these A. & V. men on, what effect did it have on the I. C. men that were lower than the men who were put in with respect to the I. C. men's position on the seniority roster?

A. It naturally reduced those of the I. C. men that were effected by the roster,—those that were effected by the merger.

Q. As representative of the Brotherhood of Railroad Trainmen you agreed to that on behalf of the Trainmen, as I understand it?

A. My full general committee agreed to it.

Q. You mean you who were there representing the Trainmen?

A. That is correct.

Q. Was there or not at that time machinery provided for in the contract between the Brotherhood and the Railroad any by-laws and constitution for the Brotherhood of Railroad Trainmen whereby that action could be challenged?

A. Oh, yes.

Q. Was it challenged by any A. & V. switchmen?

A. Not to my knowledge.

Q. When was the first time that you ever heard Mr. Moore was complaining about his place on the roster?

A. The first intimation I had of his complaint was when I received a letter from him in December, 1937, some five years later.

Q. That was five years and one month after the consolidated roster had gone into effect?

A. Yes, sir.

215 Q. At that time did you go into the matter with him?

A. I replied to Mr. Moore's letter when he wrote me in connection with it.

Q. Did you arrange to go into it for any reason?

A. I cited him the law of our organization—

By Mr. Potter:

We object to the contents of any letter.

By the Court:

Objection sustained.

Q. I want to know if you declined to go into it for any reason?

A. I did because of our law.

By Mr. Potter:

We object.

By the Court:

I will overrule the objection.

Q. Was Mr. Moore at that time a member of the Brotherhood of Railroad Trainmen?

A. He was.

Q. Is he a member of it today?

A. I couldn't say.

Q. Do you know whether or not he has ever
216 been dropped from the rolls?

A. Yes, I know he has been in and out.

Q. You don't know whether he is a member of the organization today or not?

A. No.

Q. You do know that when he wrote that letter he was a member of the organization?

A. That is correct.

Q. Do you know how soon after this consolidated roster was put into effect he joined the Brotherhood of Railroad Trainmen?

A. Not without going to the records.

Q. Mr. Moore was admitted to the lodge in Jackson on February 6, 1921?

A. Yes, and he was expelled for non-payment of dues on July 1, 1924. He was re-admitted on June 13, 1930, and expelled on January 1, 1931, and re-admitted February 27, 1931.

Q. Is that the last record you have?

A. He was expelled on January 1, 1933. That is the last record I have.

Q. Back to this proposition when Mr. Moore complained to you some five years and one month after the seniority roster was agreed upon, do you know whether or not Mr. Moore appealed to any other officers of the Brotherhood of Railroad Trainmen?

217 A. He appealed from my decision to the President of the organization, Mr. A. F. Whitney. Mr.

Whitney gave him the same answer that I gave, in substance.

Q. When was the first time you ever heard of any dissatisfaction on the part of Mr. Moore in regard to this list here?

A. The next I heard was when I was informed that Mr. Moore had brought suit.

Q. Did you or not, as an officer of the Brotherhood of Railroad Trainmen, advise him to bring the suit?

A. I did not.

By Mr. Potter:
We object.

By the Court:
I will sustain the objection.

Q. Did he or not make any inquiry of you as to the advisability of filing suit?

By Mr. Potter:
We object.

By the Court:
Objection overruled.

218 A. He did not.

Q. With whom is the power vested to take up with the management of the Railroad the grievances in regard to seniority lists and the places of the individual men on the list?

A. First with the local committee of local officers, and if not satisfied with the disposal of it there, it is then referred to my office to be handled by the general office.

Q. Was Mr. Moore or anyone acting for him ever requested to have you, as officer of the Brotherhood of Railroad Trainmen to take up with the Railroad Company

this question of seniority other than this letter you are talking about five years later?

A. No.

Cross Examination.

By Mr. Potter:

Q. Mr. Moore was expelled for non-payment of dues in July, 1924?

A. Yes, sir.

Q. And when was he re-admitted?

A. Expelled July 1, 1924, and re-admitted June 13, 1930.

Q. And then expelled again for non-payment?

A. January 1, 1931.

Q. That is the last record you have of it?

A. No, he was re-admitted February 27, 1931, and was expelled January 1, 1933.

Q. Now, at the time of the consolidation of this roster in Jackson in 1926, none of the former employees,
219 switchmen of the Alabama & Vicksburg Railway Company, were members of the Brotherhood of Railroad Trainmen, were they?

A. Yes, some of them were members.

Q. All of them belonged to the Switchmen's Union of North America, so far as you know?

A. No, I don't think they did.

Q. The Switchmen's Union of North America, however, had a contract with the Alabama & Vicksburg Railway Company, didn't they?

A. I would say yes.

Q. Now, did not Mr. A. E. McGhee represent the former employees of the Alabama & Vicksburg Railway Company, which employees were then working for the I. C. Railroad Company in the so-called West Yard, and did he not seek admittance to that conference out of which the consolidated roster grew?

A. I couldn't answer that.

Q. You know Mr. McGhee, don't you?

A. Yes, sir.

Q. Didn't you deny him admission on the ground that he was not a member of the Brotherhood of Railroad Trainmen?

A. I couldn't answer that yes or no, but if he was not a member of the Brotherhood of Railroad Trainmen, he would not have been admitted.

Q. Even though those men's fate was involved in that meeting?

A. He would not have been admitted.

Q. Those men's fate was involved in that meeting?

A. The word "fate" covers a lot of territory.

220 Q. I mean their position on the seniority roster?

A. Their position on the seniority roster was determined by the I. C. General Committee.

Q. At that time and place?

A. Yes, that is right.

Q. All right, now, you stated, I believe, that the two oldest men on the A. & V. roster were given their actual seniority and the last two men were put at the foot of the list, and the remainder were put in on the basis of four to one?

A. That is correct.

Q. As a matter of fact, were not the first twenty-five, with the exception of Tobias Dolittle and one man from the G. & S. I. Yard, all I. C. men and weren't those twenty-five men all given their actual seniority?

A. I would have to look at the records.

Q. Isn't Hampton the first man on the consolidated roster after Tobias Dolittle that worked formerly for A. & V.?

A. Will you please ask that question again?

Q. Isn't Hampton, No. 26 on the consolidated roster, the first A. & V. man with the exception of Tobias Dolittle?

A. Well, J. G. Hampton, A. & V. yardman, third on the A. & V. list, was placed between J. N. Varnado and R. N. Steel.

Q. He is numbered 26 is he not?

A. I can't tell you about that.

Q. You wouldn't deny that he is No. 26 on
221 that list?

A. Neither will I say yes, because I don't know.

Q. You did state they were put in on the basis of four to one following Dolittle?

A. With the exception of one place and that was J. N. Varnado, who at that time was regular yardmaster and was not considered a young man.

Q. What was the number of the first A. & V. man on that seniority list after Tobias Dolittle?

A. My list isn't numbered and that is rather hard for me to determine.

By Mr. Byrd:

We will admit that on the seniority list of yardmen at Jackson, Mississippi, on November 13, 1926, J. G. Hampton was number 27, and he was the first man with the exception of Tobias Dolittle that was formerly employed by A. & V. on that list.

Q. Are you familiar with the declaration of policy of the Brotherhood of Railroad Trainmen in the matter of consolidation of yards?

A. I don't know what you mean by declaration of policy.

Q. In the triangle meeting at Houston didn't the general convention promulgate what was called a declaration of policy with regard to the consolidation of yards?
222 A. Where?

Q. At the Houston meeting?

A. No, sir.

Q. At any time prior to 1931?

A. Yes, sir.

Q. When and where?

A. 1925 in Cleveland.

Q. That declaration of policy was a cut in on the basis of engine hours?

A. I would have to read it to answer that.

Q. Will you please read it?

A. I will be glad to.

Q. In the consolidation of two yards of the same railroad did the Brotherhood have any different policy from that?

A. The general committee on the line effected would have a right to adopt their own policies.

Q. They didn't adopt a policy on the basis of engine hours in this case, did they?

A. Yes, sir.

Q. How many engine hours were the men in the West yard numbering at the time of the merger and for sometime, long enough to make a consistent basis, prior to the consolidated roster?

A. I couldn't give you exactly, because I don't have those figures, but they were taken into consideration and the method of merging those two yards, if you please, was based on the engine hours, as well as the number of men involved and the men from the A. & V. were
223 given their full quota of work in accordance therewith.

Q. In other words, they were given places on the I. C. Jackson yardmen's list to the extent that they would hold the same kind of job at the Jackson yard that they held in the A. & V. yard,—that is the two senior men that were given their seniority position, and the third man, Hampton, I think his name is, could hold a daylight job at the time, and so on down the list? And the reason the two men at the bottom of the list were placed there is

that they were so far down on the A. & V. list that they had not worked for a considerable period of time.

A. Yes, sir.

Q. At the time was not the I. C.—at the time the I. C. took over the West Yard had not the A. & V. for a long time prior to the consolidation operated four engines?

A. The facts are that when the merger started, as I recall it, in June, 1926, the A. & V. men started coming over to the I. C. and performing a certain portion of the work there and the I. C. men were raising the dickens with me and the management because we didn't get together and make a settlement on it.

Q. I am asking if you know as a matter of fact, and if you don't won't you say so, that the A. & V. for a number of years prior to the lease of the I. C. Railroad becoming effective, operated four engines in the so-called West Yard?

A. We only went back for a period of one year and I couldn't answer that.

224 Q. Well, for a period of one year?

A. I don't think they did.

Q. Will you deny that they were working four engines?

A. Yes, sir. Regularly.

Q. And at the same time and for the same period were not the I. C. Railroad Company operating in the North Yard 12 engines?

A. I couldn't answer that without going to the records.

Q. Would you deny that they were operating four engines in the West Yard?

A. In answer to that question I will say that the total number of engines hours was gone into for a period of 12 months prior to the consolidation and we didn't go into the number of engines working daily because they would vary. But we took the total number of engine hours worked in each yard for a period of 12 months prior to the merger.

Q. I ask you do you now deny that there were regularly working in the West yard during the time the I. C. had it and for the period that you went into when the A. & V. had it, four engines in the West Yard?

A. I absolutely deny it and you can't find it.

Re-Direct Examination.

By Mr. Byrd:

Q. In making this consolidated roster I believe you stated it would have an effect on the I. C. men already working in the I. C. yard in that whenever an A. & V. man was put in it would reduce those men below him one number at least on the roster?

A. It reduced the first man one and the second man two and so on down.

Q. It would have that effect on the I. C. men?

A. That is correct. In fact, we wouldn't have had to take any A. & V. switchmen over at all for the reason that the work was coming over to the I. C. Yard and not being performed in the A. & V. Yards.

Re-Cross Examination.

By Mr. Potter:

Q. Do you know any switchman or employee that the Illinois Central Railroad has discharged for filing a lawsuit against it?

A. I don't know of any switchman, but I know of a fireman and a trainman.

Q. Your experience covers the entire system from one end to the other?

A. Yes, sir.

226 S. HESTER, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Who are you working for?

A. Illinois Railroad Company.

Q. How long have you been working for them?

A. About thirty years.

Q. In what capacity?

A. Switchman and engine foreman and yardmaster.

Q. Where abouts?

A. In Jackson.

Q. As engine foreman and assistant yardmaster, what, if anything did you have to do with the placing of the men or calling men as engine foremen?

A. When I was yardmaster I placed the switchmen and engine foremen.

Q. Did you ever have occasion to place Mr. Earl Moore as engine foreman?

A. Yes, sir.

Q. Who was your yardmaster at that time?

A. Mr. Harding.

Q. Did Mr. Harding make any objections about an assistant as engine foreman?

A. Yes, sir, he raised sand when he came around and found fellows he didn't like on the job.

227 Q. Do you know whether he liked Mr. Moore or not?

A. I don't know whether he liked him or not, but that was his general way of doing.

Q. Did he like his work?

A. He didn't like his work.

Q. Did you observe Mr. Moore's work?

A. Not particularly.

Q. Well, you were assistant yardmaster?

A. Yes, sir.

Q. Did his work come under your supervision?

A. Yes, sir.

Q. What kind of switchman would you say he was?

A. He wasn't one of the best. He didn't seem to be.

Q. What was his trouble, if anything?

A. If he would go to do anything it would take him a long time. He was slow.

Q. What other objection was there to him, if any?

A. I didn't see any.

Q. What about his regularity of work?

A. He didn't work very much.

Q. If you have an engine crew which is used to working together and you have a member of that crew that works intermittently,—works today and doesn't work tomorrow, and works day after tomorrow and then doesn't work for three or four days,—does that contribute
228 to the efficiency of that crew?

A. I think it wouldn't.

Q. In what way?

A. Well, you put a new man on each day, he won't know just what he should do.

Q. Did you say it would contribute to the good work or detract from the good work of the crew?

A. It wouldn't be so efficient a crew.

Q. During your time as an employee of the I. C. Railroad Company would you say whether or not you knew the general rule of the I. C. Railroad Company as to what effect it would have on the man's employment if he filed a lawsuit against the Company?

By Mr. Potter:

We object to that.

By the Court:

I will overrule the objection.

Q. Do you know what happened to men that filed lawsuits against the company?

A. They were fired.

Q. How long have you been knowing that was a rule?

A. It has been my impression ever since I have been on the Railroad. I don't know whether it is a rule or not.

229 Cross Examination.

By Mr. Potter:

Q. You say you don't know whether it was a rule or not?

A. I don't know whether it is a rule or not.

Q. That is an impression you got?

A. Yes, sir

Q. How long were you on the yard under Mr. Harding?

A. I don't know exactly.

Q. Two or three years?

A. About two years.

Q. You were yardmaster up until the time you were injured in 1930, were you not?

A. Not all the time.

Q. But you were at the time of your injury, were you not?

A. Not at the time of my injury.

Q. But prior to your injury for about two years you were yardmaster?

A. Yes, I had been.

Q. You had been day and night yardmaster?

A. Yes, sir.

Q. And during the period when you had been day and night yardmaster was the period during which Earl Moore, the plaintiff in this case, had been working for the I. C.?

A. Well, he worked for me, yes, sir.

Q. Now, did you ever reprimand Mr. Moore for any delinquency in his work?

A. No, I didn't reprimand him.

230 Q. Did you report him for any inefficiency?

A. No, sir.

Q. Isn't it one of the rules that a man must not hurry in that work? That is true, isn't it?

A. I don't know.

Q. Now, as I understand it, the Railroad Company has a seniority roster which includes a great many men on the extra board,—men that do not work reguarly? That is true, isn't it?

A. Not a great many men.

Q. Several men?

A. Yes, sir, some.

Q. As long as there were available competent men on the extra board, do you know of a single time that the I. C. Railroad Company has complained of a man laying off work?

A. Mr. Harding used to complain about it.

Q. What men were they?

A. He is one of them. Johnson is one of them.

Q. You are talking about John Johnson?

A. Yes, sir, he has told me to take him out of service.

Q. As a matter of fact, Johnson ran a restaurant and only returned out there to hold his job on the board?

A. Yes, sir.

Q. That was with the knowledge of the Railroad Company?

A. Yes, sir.

Q. He is still working for the Railroad Company?

A. Yes, sir.

232 J. R. FOREMAN, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. I live in Jackson.

Q. By whom are you employed?
A. I. C. Railroad Company.
Q. How long have you been employed by them?
A. Since January, 1913.
Q. In what capacity?
A. Switchman and yardmaster.
Q. Were you employed during that time in the Jackson, Mississippi, yard?
A. Yes, sir.
Q. Do you know the plaintiff in this case, Earl Moore?
A. Yes, sir.
Q. Were you working for the I. C. when Earl Moore was working for them?
A. Yes, sir.
Q. Did you ever observe Earl Moore's work as switchman?
A. I was yardmaster when he was working there.
Q. Did you have occasion as a yardmaster to observe his work?
A. Yes, sir, he didn't work much of the time. He was off sick a lot.
233 Q. When he reported he was sick, what was the occasion for him making those reports?
A. He would call up and lay off sick.
Q. When he was called for work?
A. He would lay off the call board.
Q. How often would that occur?
A. He was sick quite a bit during the time he was working.
Q. Do you know of your own knowledge that he was sick?
A. That is what he said.
Q. Now, did you ever observe his work as to efficiency of his work?
A. He never did turn out work very good.
Q. Why?
A. He was kind of slow on the job.

Q. During your time as an employee of the I. C. Railroad Company, do you know what the rule of the I. C. has been with reference to men employed by them who filed suit against the Railroad?

A. It is generally understood by me and practically everybody else that it was an automatic discharge if they filed suit.

Q. That had been the rule during the whole time you were employed by them?

A. Yes, sir.

By Mr. Potter:

We object and move the Court to exclude that.

234 By the Court:

I will overrule the objection.

Q. How long had you been yardmaster during the time you were working for I. C.?

A. I was yardmaster from 1918 to 1933.

Q. During that period Mr. Moore was an employee of the I. C. Railroad Company?

A. Not all the time, but part of the time.

Q. And as a switchman he came directly under your supervision?

A. Yes, sir.

Q. Did you ever issue or request your immediate superior to issue any reprimand to Mr. Moore on account of anything he did or failed to do as switchman?

A. I don't remember it.

Q. As I understand it, the I. C. Railroad Company has what the men generally denominate as a service card, do they not?

A. Yes, sir.

Q. They maintain that?

A. The Company does, I think.

Q. And on that service record card there is supposed to be demerits marked whenever any employee of the Railroad Company does not do that which he is supposed to do?

A. They don't get marks for all they are supposed to do that they don't do.

Q. Did you ever request any demerits to be placed against Mr. Moore's record?

235 A. No, sir.

Q. In other words, for trivial matters they were not demerited?

A. No, sir.

Q. If you had ever observed Mr. Moore either in acting or in failing to act while you were his superior, doing anything or failing to do anything that in your opinion would have merited either a reprimand or five or more demerits, you would not have hesitated to give them or to ask your superior to issue the reprimand or the demerits?

A. No, I look over lots of things.

Q. If you had ever seen Mr. Moore doing anything that in your opinion would necessitate placing demerits against his record, it would have been your duty to so notify your superior, wouldn't it?

A. It would have been my duty, but I don't do my duty quite sometimes in that line.

Q. Can you remember anything that Moore ever did that he should have been demerited for and you didn't request demerits to be placed against his record?

A. I don't put demerits against a man if he is slow on the job. I don't give out demerits for that.

Q. Did you ever complain to Mr. Harding or anyone else about Mr. Moore being slow?

A. Mr. Harding complained to me a lot of times about letting him work the engine.

236 Q. Do you know of a single instance when an employee of the Railroad Company was discharged, up until the time Mr. Moore was discharged, because he filed a lawsuit against the Railroad Company?

A. I can't recall any.

Q. Do you know of any person that the Railroad Company has ever complained of for failing to report to work when work was available to him, if there were sufficient capable men on the extra board to take his place?

By Mr. Byrd:

We object.

By the Court:

Objection overruled.

Q. If he notified the call board?

A. If he lays off and notifies the proper one. The call board usually handles that part of it.

237 C. E. MORPHIS, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Jackson.

Q. What business are you engaged in?

A. Switching for I. C.

Q. How long have you been employed by them?

A. As switchman or altogether?

Q. Altogether.

A. Twenty-three years.

Q. How long as switchman?

A. Fifteen years.

Q. Where were you employed?

A. At the Jackson, Mississippi, Yard.

Q. Were you employed in the Jackson, Mississippi, Yard in 1926?

A. Yes, sir.

Q. Were you employed there when the consolidated roster was published on which the A. & V. Railroad employees were put on the seniority roster of the I. C. Railroad Company?

A. Yes, sir.

Q. Were you a member of the Brotherhood of Railroad Trainmen at that time?

A. Yes, sir.

238 Q. Are you a member of that organization now?

A. Yes, sir.

Q. What position, if any, do you hold with the local organization?

A. Chairman of the local grievance committee.

Q. As chairman of the local grievance committee, what are your duties with reference to the complaints of the men of violation of the contract or other rules governing their work with the Railroad?

A. I handle their claims with the management.

Q. How long have you been chairman of the local grievance committee?

A. Since 1933.

Q. Who was the grievance man prior to that?

A. H. H. Cutler.

Q. At the time this new arrangement was made and the A. & V. switchmen were cut in, did or not that cutting in have any effect on the I. C. employees there in the Jackson Yard?

A. Yes, sir.

Q. Did it have any effect on you?

A. Yes, sir.

Q. Did or not the men continue to work on that roster without objection, so far as you know?

A. Yes, sir.

Q. When was the first time you heard that Mr. Earl Moore was objecting to that cut in?

A. Some four or five years later, and then it
239 was sandhouse talk.

Q. That is something you can't trace to its source?

A. Yes, sir, talked around in the shed and on the corners.

Q. Mr. Moore was doing some of the talking, was he?

A. Yes, sir, I believe so.

Q. Do you know what effect that had upon the rest of the switchmen in the yard,—whether or not it disturbed them or whether or not they were all satisfied?

By Mr. Potter:

We object to that because it is incompetent.

By the Court:

I will overrule the objection.

A. There was quite a bit of objection from both sides.

Q. After the men continued to work under it two or three years, did or not that objection die down?

A. Yes, sir.

Q. When it was again agitated, did it disturb some of the men?

A. I don't recall that it did. There might have been some talk about somebody else having a suit if Mr. Moore won his.

Q. That was generally circulated around the Yard that the outcome of Mr. Moore's suit—

240 By Mr. Potter:

We object to the general rumor.

By the Court:

Objection overruled.

Q. If Mr. Moore won his suit there would be some other suits?

A. Yes, sir.

Q. Do you know the general rule of the I. C. Railroad Company with reference to men who file suit against it while employed by the Company?

A. I understand it that when you file suit against the Company your services are automatically terminated.

Q. When did you find that out?

A. That is some more sandhouse talk.

Q. It was talked generally around the switch shanty?

A. Yes, sir.

Cross Examination.

By Mr. Potter:

Q. You don't recall a single man, up to the time Mr. Moore was discharged, ever having been discharged because he did file a lawsuit?

A. No, sir.

Q. That was just sandhouse talk?

A. Yes, sir.

241 Q. That is true?

A. Yes, sir.

Q. You never received that information from any official source?

A. No, sir.

Q. You never saw it in the printed rule?

A. No, sir.

Q. Now, were you the local chairman in 1926 when this consolidated roster was promulgated?

A. No, sir.

242 T. S. JACKSON, witness for defendant, recalled for further cross examination, testified as follows:

Cross Examination.

By Mr. Potter:

Q. As general chairman of the grievance committee of the I. C. Railroad Company of the Brotherhood of Railroad Trainmen, you would not have taken up the grievance of a switchman seeking to establish his right to work in the Jackson Yard over a member of the Brotherhood of Railroad Trainmen by reason of any rights he claimed under the Switchmen's Union of North America contract?

A. I think I would have considered it the duty of the Switchmen's Union to take that up.

243 L. E. HOWARD, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Hobart, Indiana.

Q. With headquarters in Chicago?

A. Yes, sir.

Q. Are you employed by the Illinois Central Railroad Company?

A. Yes, sir.

Q. How long have you been employed by them?

A. A little over 41 years.

Q. In what department of the Railroad are you now employed?

A. Superintendent of wages and working conditions.

Q. As such superintendent, what are your duties?

A. Well, up until about a year ago I attended all hearings, meetings and conferences in connection with wage matters and grievances, with the possible exception of five, since 1914.

Q. Did that have to do with the establishment of seniority rosters?

A. It would, yes, sir.

Q. It would have to do with the wages and working conditions of switchmen and trainmen?

A. It would.

Q. And the construction of their contract?

244 A. It would.

Q. And the enforcement of their contract?

A. It would.

Q. Are you familiar with the transaction at Jackson, Mississippi, in 1926 when the consolidated roster was published there for the I. C. Yard?

A. I remember it, yes, sir, but I was not at the conference.

Q. As I understand it, that conference took place at Jackson?

A. Yes, sir.

Q. But you were informed of it?

A. Yes, sir.

Q. I will ask you whether at that time you had any connection with the General Manager's office?

A. I reported to the General Manager.

Q. Were you familiar with the arrangements and conferences the General Manager had with the various Union labor organizations regarding complaints about the contract?

A. Yes, sir.

Q. Do you remember in 1927 any conference or complaint or anything having been presented to the General Manager of the Railroad, or to you as Director of wages and personnel, by any officer of the Switchmen's Union of North America pertaining to the consolidated roster of Jackson, Mississippi?

A. I think if my memory serves me correctly on June 8, 1928, President Canon of the Citizens' Union wrote Mr. Patterson asking for a conference. He didn't think
245 the list had been drawn up correctly. Mr. Patterson replied to him on June 12 and said to him that we were in conference with two other organizations and as soon as he had the opportunity he would get hold of him and have a conference with him. Mr. Canon left town and that is the last we heard of it.

Q. Is the I. C., or was the I. C., so far as you know, a party to the complaint filed by the Switchmen's Union of North America against the I. C. before the National Railroad Board in regard to this matter?

A. That is something I never heard of.

Q. Is it a part of your duty to know whether such things are filed?

A. It would certainly come to my desk.

Q. Did it ever come to your desk?

A. Not to my knowledge.

Q. You are familiar with the proceedings that took place in the other lawsuits that Mr. Moore filed against the Illinois Central?

A. Yes, sir.

Q. You were a witness in this other lawsuit?

A. I was not put on the stand.

Q. You were here to testify?

A. Yes, sir.

Q. Do you know how many witnesses the Illinois Central had at that trial?

A. With the officers and me and the employees,
246 I would say somewhere in the neighborhood of thirty.

Q. Now, do you know or can you give us an estimate of what the cost of defending that lawsuit was to the Illinois Central?

By Mr. Potter:

We object because that is immaterial.

By the Court:
I will overrule the objection.

A. Well, it would be in the neighborhood, I would say, of $2,000.00, pro rating the time that we lost from our work and other duties.

Q. Did that include any of the expense of attending the trial?

A. It included some expense away from home that we had to be reimbursed for.

Q. How long did you say you have been working for the Illinois Central?

A. Forty-one years.

Q. Do you know the general rule of the Illinois Central Railroad Company with respect to employees who file suit against the Company?

By Mr. Potter:
We object.

By the Court:
Objection overruled.

247 A. Yes, sir, I do.

Q. What is that rule?

A. It has been a rule that when an employee files suit against the Railroad he automatically severs himself from service.

Q. Do you know of any occasion when any employee of the Railroad Company has been discharged for filing suit against the Company?

A. Yes, sir, I had the opportunity and cause to check on some fourteen months ago, and as near as I could find there were 27 such cases in the I. C. System.

Q. Any of them switchmen?

A. Yes, sir, a number of them were switchmen.

Q. Any of them brakemen?

A. Plenty of them.

Cross Examination.

By Mr. Potter:

Q. What has been the form through which the management has informed the men of such a policy?

A. Well, not being out in the division and being with the men, I couldn't answer that question.

Q. Do you know a single printed rule to that effect?

A. There is none.

Q. There is none?

A. Not that I know of.

Q. What did you say your position was?

A. Supervisor of Wages.

248 Q. And also matters of grievance?

A. That is right.

Q. As such it would have come to your attention?

A. No, that would be strictly an operating matter.

Q. You are generally familiar with the operation of the Railroad in regard to those matters?

A. I am somewhat familiar with the operation.

Q. You don't know of any printed rules?

A. I said none that I know of.

Q. Don't you know there are none?

A. I wouldn't say there is and I wouldn't say there isn't. I never saw one.

By Mr. Byrd:

Defendant rests.

249 E. A. FLEMING, witness for plaintiff, introduced in rebuttal, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. By whom are you now employed?

A. Illinois Central.

Q. How long have you been working for them?
A. Since 1902.
Q. In what capacity?
A. Switchman and engine foreman.
Q. Do you know the plaintiff in this case, Earl Moore?
A. Yes, sir.
Q. From 1926 to 1933 he was employed also by the Illinois Central?
A. I suppose so. He was in their employ, but I don't know how long.
Q. Did you have occasion to work with Mr. Moore and around Mr. Moore during the period when he was switchman for the Illinois Central?
A. Yes, sir.
Q. Did you observe his work?
A. Yes, sir.
Q. Tell the Court if you ever observed Mr. Moore acting in any capacity other than as an efficient Switchman?
A. I don't remember that I have.
Q. As I understand it, the Illinois Central
250 maintains an extra board?
A. Yes, sir.
Q. Were there or not sufficient capable men on the extra board and if a man is supposed to work and notifies the call board that he is going to lay off, have you ever heard of any complaint of such action on the part of the Illinois Central?
A. I don't know that I have.

Cross Examination.

By Mr. Byrd:
Q. How many times did you ever see Mr. Moore perform his work?
A. I couldn't say.
Q. You don't know?
A. No, sir.

251 JOHN MASTERS, witness for plaintiff, called in rebuttal, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. You are a resident citizen of Jackson?

A. Yes, sir.

Q. And are now employed by the Illinois Central Railroad Company?

A. Yes, sir.

Q. How long have you been working for the Railroad?

A. Thirty-eight or thirty-nine years.

Q. Do you know the plaintiff in this case, Earl Moore?

A. Yes, sir.

Q. Did you know him at the time when he was working as a switchman for A. & V.?

A. Yes, sir.

Q. Did you know him at the time he was working as switchman for the Illinois Central Railroad?

A. Yes, sir.

Q. During the time he was working as switchman for the I. C. Railroad Company did you have occasion to come in contact with him from time to time during that entire period and observe his work as a switchman?

A. Yes, sir.

Q. Please tell the Court whether or not on
252 any occasion you ever saw Mr. Moore act other than as an efficient switchman?

A. No, sir.

Q. The Railroad Company maintains an extra board, does it not?

A. Yes, sir.

Q. That is men who do not work regularly?

A. Yes, sir.

Q. Those are the younger men in point of service?

A. Yes, sir.

Q. Assuming that a senior man has work available for him, but does not desire to work, and he notifies the call board to that effect and there are competent men on the extra board available to work, under such circumstances have you ever heard of the Railroad Company making any complaint when a man lays off?

A. No, sir.

Q. You know, do you not, that the Railroad has what they call a service card or efficiency record card?

A. I don't know. I have never seen such a card. They have efficiency records.

Q. Do you know that any action that any employee takes that merits discipline is noted on such a card?

A. They write a letter notifying him.

By Mr. Byrd:

No questions.

253 J. A. VARNADO, witness for plaintiff, called in rebuttal, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. You are a resident of Jackson and an employee of the Illinois Central Railroad Company, are you not?

A. Yes, sir.

Q. How long have you lived in Jackson?

A. Practically all my life.

Q. How long have you been working for the Illinois Central?

A. Since March, 1913.

Q. What positions with the Railroad Company have you held?

A. Well, as clerk and switchman and yardmaster.

Q. And as switchman, having been both helper and engine foreman, have you not?

A. Yes, sir.

Q. During what period of time were you yardmaster?

A. September, 1925, to November, 1927.

Q. Mr. Moore was working for the I. C. Railroad Company during a portion of that time, was he not?

A. Yes, sir.

Q. In the capacity as switchman?

A. Yes, sir.

Q. You were one of his immediate superiors, were you not?

A. I don't know. I didn't call myself much of a boss out there.

254 Q. As a matter of fact, when you were yardmaster you were over Mr. Moore?

A. Yes, sir, in the performance of his duty he was supposed to take instructions from me.

Q. During the time that you were yardmaster did you have any occasion to reprimand or issue any demerits and make any complaint about Mr. Moore's work?

A. I had no occasion to make any complaint about his work and I wouldn't have been authorized to make any demerits. That is with the trainmaster.

Q. If he had failed to perform his duty it would have been your duty to report him to the Superintendent?

A. Yes, sir.

Q. And you would have done your duty?

A. Yes, sir.

Q. After you ceased being yardmaster then you were engine foreman?

A. Yes, sir.

Q. As engine foreman and while Mr. Moore was working for the Railroad Company, did you observe his work?

A. Well, no, I didn't have occasion to observe his work that I recall because most of the time I worked practically all the time at night and he worked practically all the time in the daytime.

Q. At the time of the consolidation of this roster in 1926 how many engines was the I. C. operating in the North Yard?

255

A. I am not exactly positive about that, but when we took over the G. & S. I. we had 14 engines and I think we were working about 12 or 13 when we took over the A. & V.

Q. You are familiar with the fact, are you not, that the Railroad Company has what you may call a service record card and which they denominate as an efficiency record?

A. Yes, sir.

Q. Please state whether or not it is a fact that any action of a switchman that merits discipline is noted on that card?

A. Well, in cases that are considered serious enough by the officer in charge,—I might say the general yardmaster or trainmaster,—an investigation is held and if it is decided that the man merits discipline, that is noted on the service record.

Q. Do you know of any incident when a switchman to whom work was available who desired to lay off work and not work on that day or for several days and who notified the call board of such fact, and when there were competent men on the extra board available for service, has the Railroad Company to your knowledge ever complained of such action on the part of the man?

A. The only time that they complained was when men were short and if a man don't want to work then, you have to take some action, if he continues to dodge his duty to the Railroad. If there are plenty of men, he is permitted to lay off.

Q. From the time that Mr. Moore severed his
256 relation with the Company there were plenty of extra men on the board?

A. I can't say. At times there were and at times there weren't during the time I was working out there.

Q. Did you ever run out?

A. At times we ran out.

Cross Examination.

By Mr. Byrd:

Q. This demerit proposition that he is talking about, it is a fact that a man cannot have a demerit placed on his record until charges are filed against him and he is given an opportunity to be heard and they hold an investigation?

A. That is right.

Q. You did not work with Mr. Moore?

A. To the best of my knowledge Mr. Moore and I have never worked on the same crew.

Q. When you were working as yardmaster how many engine crews did you have under you?

A. It varied according to the shipping. Sometimes it would be three and sometimes six or eight.

Q. They were scattered all over the yard?

A. Yes, sir.

Q. It wasn't possible for you to have your eye on them all the time?

A. No, sir.

Q. Do you know what Mr. Moore's ability as
257 a switchman was?

A. I never heard any complaints against him and I never noticed him do anything that was out of line or wrong.

Q. You didn't have occasion to watch him do anything?

A. No, sir, most of the time I didn't. Mr. Moore was in the A. & V. employ and when he was on the shift I worked, then he worked in the A. & V. yard.

258 A. E. McGHEE, witness for plaintiff, recalled in rebuttal, testified as follows:

Direct Examination.

By Mr. Potter:

Q. At the time of the consolidation of this roster into the roster of November, 1926, and for one year prior thereto, how many engines were working regularly during the time that the Alabama & Vicksburg Railway Company operated it and during the time it was operated by the I. C. Railroad Company?

A. I don't get the question.

Q. For a year prior to the consolidation of the roster, how many engines were working in the West Yard out there at the time the I. C. was operating it or at the time the A. & V. was operating it?

A. Prior to the consolidation the A. & V. had three 7-day jobs and one 6-day job.

Q. Working every day?

A. Yes, sir.

Q. For a year prior to the roster?

A. Yes, sir.

259 Cross Examination.

By Mr. Byrd:

Q. You mean prior to the roster or prior to the consolidation?

A. Prior to the consolidation.

Q. After the consolidation what was the ratio?

A. Anywhere from one to three working there all the time.

Q. What was the number of engines working in the I. C. Yard?

A. All worked from the same place.

Q. How many engines worked in all in the Jackson Yards, including the A. & V.?

A. Fifteen to seventeen engines.

By Mr. Potter:

Plaintiff rests.

260 By Mr. Byrd:

I would like to renew our motion for a directed verdict and entry of judgment for the defendant.

By Mr. Potter:

At this time the plaintiff also moves for judgment.

By the Court:

I will reserve ruling on both of these motions.

---

262 Filed February 21, 1939.

February 20, 1939.

Honorable Chalmers Potter,
Attorney at Law,
Jackson, Mississippi.

Messrs. May & Byrd,
Attorneys at Law,
Jackson, Mississippi.

Re: Earl Moore
vs. 8086.
Illinois Central Railroad Co.

Gentlemen:

I have reached the conclusion that the plaintiff is entitled to a judgment, as I think the decision in the case of Moore v. Illinois Central, 176 S. 593 and G. & S. I. v.

McLaughan, have established the right of the plaintiff to recover and the facts as shown by the record did not justify the company in breaching its contract. The validity of the contract was upheld by the Supreme Court of Mississippi and, of course, under the Erie Railway Company case, that decision is binding upon the Court.

I think the real reason of the Company in discharging Moore was because he filed the suit for the purpose of establishing his standing on the priority list, and I believe the better reasoned cases hold that the filing of a lawsuit in good faith is not sufficient cause to breach a contract. Of course, it would be a sufficient reason not to employ a man or not to renew a contract when there was an option to renew, since in that instance the Company would have a right to employ or not, but after a valid contract is once entered into, then I think the greater weight of authorities is to the effect that
263 the filing of a lawsuit in good faith is no excuse for breaching a contract.

In the present case I think the plaintiff was acting in good faith in an effort to determine just where he stood. He consulted reputable counsel who advised the suit. Therefore, I think that the case of Odeneal v. Henry, 70 Miss. 172, and the others cited by defendant are not applicable. It is true that that an employer has the right to make reasonable rules and regulations and if the reasonable rules and regulations are violated, then the right to discharge arises, as was held in Corley case, 107 Miss. 67. The conduct was sufficient to justify the discharge, but in the present case there was a situation existing confronting the employees that meant much more to them than the ordinary situation, and really meant much to the defendant railway company to determine just in what order of priority its employees stood. This was more or less in the nature of a declaratory judgment, so it cannot be said that the plaintiff was acting in bad faith.

It is true that the plaintiff laid off work a considerable amount of time, but he was not discharged for this. I think it is apparent that the real reason for his discharge was because he filed the suit. There was no published rule of the company, and it is doubtful from the evidence if the plaintiff knew that the company had such a rule, but even if there had been a published rule, it would have been necessary for it to be reasonable. I am of the opinion that an arbitrary rule that any man who files a suit would be discharged would be in violation of the terms of the written contract. Of course, the parties could enter into a contract to that effect, but such is not the contract in the present case.

264 I think the rule of damages is that the plaintiff is entitled to recover all damages that he suffered as a proximate result of the breach of the contract—not up to the time of the filing of the declaration, but for all damages that accrued to him as the proximate result of the breach, less any amount that he may have earned for himself. I do not uphold the contention, however, that the number of days worked by Cutler is the criterion by which to measure the number of days that plaintiff would have worked. I think the only reasonable rule in determining this fact is to take the average of the number of days that the plaintiff himself worked over a long period of time. Taking this as the criterion, in 1926 he worked 1/20 of the time that he could have worked; in 1927 he worked ½ of the time; in 1928 he worked 2/5 of the time; in 1929 he worked 2/3 of the time; in 1930 he worked 3/5 of the time; and in 1931 he worked about 1/5 of the time. By taking the average from these deductions it will be shown that he worked approximately ½ of the time that he could have worked. If we take the total number of days in the year that he could have worked, to-wit, 336 days, and divide that by one-half the time, which I find from the evidence he would have worked, we reach the conclusion that he would have worked 168

days in the year. If his average earnings were placed at $6.64 per day, he would have earned the sum of $1,115.50 per year. From February, 1933, to November, 1936, would be three and three-fourths years and the total amount that he would have earned during that time is $4,183.20 and a judgment may be entered for the plaintiff in this amount.

265 I decline to allow interest for the reason that the amount of damages was unliquidated and I do not think that interest is properly allowable upon unliquidated damages. The record shows that he was employed in November, 1936, at a salary of $105.00 per month, which, of course, is more than he would have earned had he continued in the employment of the Railroad Company.

You gentlemen may prepare a judgment for this amount and also you may submit to me proposed findings of fact and conclusions of law along the lines outlined in this letter. I would be glad if you would submit the proposed findings of fact, but if you prefer that I made this up, I shall be glad to do so, but you can judge from the foregoing substantially what my findings of fact are.

I am filing a copy of this letter with the Clerk of the Court so that it may be considered as the opinion of the Court.

With very kindest regards, I am,

Sincerely yours,

SIDNEY C. MIZE,
District Judge.

266 ORDER.

Filed March 9, 1939.

C. O. B. 1. p. 277.

(Title Omitted.)

This cause having come on at a former day of this term of the Court to be heard before the Court without a jury, and the Court, having heard all of the evidence and considered the same, is of the opinion that the plaintiff is entitled to a judgment in the sum of $4,183.20:

It is therefore

Ordered by the Court that the plaintiff, Earl Moore, do have of and from the defendant, Illinois Central Railroad Company, the sum of Four Thousand One Hundred Eighty-three and 20/100 ($4,183.20) Dollars, and interest at the rate of 6% from this date until paid, together with all costs herein accrued, for all of which execution may issue.

Ordered, this the 7th day of March, 1939.

S. C. MIZE,
United States District Judge.

267 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Attached to Order Filed March 9, 1939.)

(Title Omitted.)

Finding of Fact.

1. The Court finds as a fact that the plaintiff was a member of the Brotherhood of Railroad Trainmen and the defendant entered into a contract with same, which provided the rules, rates of pay, etc., for trainmen employed by it; that the plaintiff had been employed by the defendant as trainman since June 2, 1926, and that on November 13, 1926, the defendant published a seniority roster for the trainmen, and under the provisions of this contract trainmen were given work according to their seniority.

2. The Court finds that this contract provided that no employee should be discharged without just cause;

3. That on or about February 15, 1933, the plaintiff was discharged without just cause;

4. That the defendant discharged plaintiff because plaintiff had filed suit against it on October 15, 1932, in the Circuit Court of Hinds County in which the plaintiff alleged that he had been given a lower place on the seniority roster than he was entitled to receive;

268 5. That this first suit against the defendant was filed in good faith to establish the seniority position of the plaintiff and upon the advice of his attorney, and that this filing of the suit was not sufficient and just cause to discharge him;

6. That the plaintiff was ready, willing and able at all times to carry out his part of the contract;

7. That the defendant Railroad Company had a rule which provided that any employee suing the Railroad Company would be discharged, but that this rule was not published and was not generally known among its employees;

8. That the plaintiff in this cause did not know of any such rule;

9. That the contract entered into between the Brotherhood and the Railroad Company was a valid contract;

10. That the plaintiff laid off from work a considerable amount of time, but that someone else took his place during this period; that he was not discharged for this, but that his laying off from work was waived by the defendant Railroad Company;

11. That by a breach of the contract the plaintiff has suffered damages, but that he has not shown by the evidence that he would have worked every day and is not entitled to establish his damages by the number of days that were worked by Cutler;

12. The Court finds as a fact that in determining the number of days he was damaged, the fair inference from the evidence is to take the average of the number of days that the plaintiff himself worked over a long period of time. Taking this as a criterion, in 1926 he worked 1/20 of the time that he could have worked; in 1927 he worked 1/2 of the time; in 1928 he worked 2/5 of the
269 time; in 1929 he worked 2/3 of the time; in 1930 he worked 3/5 of the time; and in 1931 he worked 1/5 of the time. By taking the average from these deduc-

tions it will be shown that he worked approximately 1/2 of the time that he could have worked. If we take the total number of days in the year that he could have worked, to-wit, 336 days, and divide that by one-half of the time, which I find from the evidence he would have worked, we reach the conclusion that he would have worked 168 days in the year; that he would have earned on an average of $6.64 per day; that from February, 1933, to November, 1936, he would have worked three and three-fourths years;

13. That based upon his average earnings he would have earned $1,115.50 per year;

14. That for the three and three-fourths years he would have earned $4,183.20 if the defendant company had carried out its contract;

15. That in November, 1936, plaintiff was employed by the government at a salary of $105.00 per month and has not suffered any damages by reason of the breach of the contract since that time;

16. That the plaintiff is not entitled to recover interest as the amount of damages was unliquidated and not definitely determined until the date of this judgment.

Conclusions of Law.

My conclusions of law are that:

1. The filing of a lawsuit by a party in good faith and upon the advice of counsel is not sufficient justification for the breach of the contract when the contract does not specifically provide that if a lawsuit should be filed against the company it would be ground for dismissal.

270 2. The company has a right to make reasonable rules and regulations with reference to filing lawsuits against it by its employees, but a rule or regulation which provides that the filing of a lawsuit against the employer would be ground for breach of contract when the employee in good faith, notwithstanding, believes that he has a right to sue for the purpose of establishing his rights, would be an unreasonable rule.

3. The contract in the present case was a valid contract and the plaintiff was entitled to sue for a breach thereof, as was held in the case of Moore v. I. C. R. R. Co., 176 So. 93; McGlohn v. G. & S. I. R. R. Co., 174 So. 250.

4. The rule of damages is that the plaintiff is entitled to recover all damages that he suffers as a proximate result of the breach of the contract, less any amount that he may have earned for himself.

5. The plaintiff is not entitled under the law of Mississippi to collect interest upon the amount of the damages so suffered for the reason that they were unliquidated and until the time that they were made certain by a judgment, interest is not allowable.

This the 7th day of March, 1939.

S. C. MIZE,
United States District Judge.

271 MOTION TO SET ASIDE JUDGMENT AS TO DAMAGES AND RENDER.

Filed March 14, 1939.

(Title Omitted.)

And now comes Earl Moore and moves the Court to set aside the judgment heretofore rendered in his favor for $4,183.20 and to re-assess his damages, and for cause thereof shows unto the Court as follows:

First: That the undisputed testimony showed that prior to Moore's discharge Moore worked whenever work was available, except when he was ill.

Second: That the undisputed evidence shows that since the discharge Moore has been in good health at all times and at all times ready, able and willing to work.

Third: No future damage was awarded.

Fourth: No interest was allowed.

And for other causes to be assigned.

CHALMERS POTTER.

I, Chalmers Potter, attorney for plaintiff, hereby certify that I have this day handed to Messrs. May & Byrd, attorneys for defendant, a true copy of the foregoing Motion.

This the 14th day of March, 1939.

CHALMERS POTTER.

272 ORDER OVERRULING MOTION.

Filed March 14, 1939.

(Title Omitted.)

Came on this day this cause to be heard upon the motion of the plaintiff to set aside the judgment heretofore rendered in his favor in so far as the damages are concerned and to re-assess his damages, and came the parties, and the Court having heard and considered said motion and argument of counsel thereon and being of the opinion that said motion should be overruled, therefore, be it and it is hereby ordered and adjudged that the motion of the plaintiff be and the same is hereby overruled, to which action of the Court the plaintiff excepted.

Ordered and Adjudged this the 13th day of March, 1939.

S. C. MIZE,
U. S. District Judge.

C. O. B. 1, p. 281.

---

273 NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS.

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

Filed March 14, 1939.

Earl Moore, Plaintiff,
vs. No. 8086.
Illinois Central Railroad Company, Defendant.

Notice is hereby given that the Illinois Central Railroad Company, defendant above named, hereby appeals to the

Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this cause on the 7th day of March, 1939.

J. L. BYRD,
Attorney for Illinois Central
Railroad Company.

Jackson, Miss.

274 State of Mississippi,
County of Hinds.

Know All Men by These Presents, That we, Illinois Central Railroad Company, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto Earl Moore in the penal sum of Five Thousand Dollars ($5,000.00), for the payment of which well and truly to be made we bind ourselves, our successors and assigns.

Yet, upon these conditions, that whereas on the 7th day of March, 1939, a judgment was entered in the District Court of the United States for the Jackson Division of the Southern District of Mississippi in the cause therein pending, styled No. 8086, Earl Moore, Plaintiff, vs. Illinois Central Railroad Company, in favor of the said Earl Moore and against the said Illinois Central Railroad Company in the sum of $4183.20, with interest at 6% per annum from said date, and all costs, and whereas the said Illinois Central Railroad Company feels aggrieved at said judgment and has prayed an appeal therefrom to the Circuit Court of Appeals for the Fifth Circuit.

Now if the said above bound principal, Illinois Central Railroad Company, shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void, otherwise to remain in full force and effect.

Witness our signatures, this the 16th day of March, 1939.

ILLINOIS CENTRAL RAILROAD COMPANY,
Principal,
By J. L. BYRD, Attorney.
AMERICAN SURETY COMPANY OF NEW YORK,
Surety,
(Seal) By W. B. GRAVES,
Attorney in Fact.

The foregoing bond and the sureties thereon approved by me, this the 16th day of March, 1939.

S. C. MIZE,
United States District Judge.

---

275 NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS.

Filed March 17, 1939.

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

Earl Moore, Plaintiff,
vs. At Law No. 8086.
Illinois Central Railroad Company, Defendant.

Notice is hereby given that Earl Moore, above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on March 14, 1939, assessing damages

against the Illinois Central Railroad Company, contending said damages were insufficient.

CHALMERS POTTER,
Attorney for Earl Moore.

401 Deposit Guaranty Bank Building,
Jackson, Mississippi.

---

276 COST BOND.

Filed March 17, 1939.

(Title Omitted.)

Know All Men By These Presents, that we, Earl Moore, principal, and James Burns and D. L. Lacey, sureties, are held and firmly bound unto the Illinois Central Railroad Company in the sum of $250.00 for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators forever.

The condition of the foregoing obligation is such that there has been lately rendered in this cause a judgment in favor of the said Moore and against the Illinois Central Railroad Company. The said Moore, feeling aggrieved at said judgment, has given notice of his appeal to the Circuit Court of Appeals for the Fifth Circuit;

Now therefore, if the said Moore shall well and truly prosecute his said appeal to the Circuit Court of Appeals for the Fifth Circuit with effect, or pay all costs that might there be rendered against him, this obligation to be void; otherwise to remain in full force and effect.

Witness our Signatures this the 17th day of March, 1939.

EARL MOORE, Principal.
JAMES BURNS,
D. L. LACEY,
Sureties.

---

277 Filed April 6, 1939.

C. O. B. 1, p. 297.

(Title Omitted.)

It appearing to the Court that Honorable Chalmers Potter, counsel of record for Earl Moore, the plaintiff in this cause, died on Saturday, April 1, 1939, and that the contents of the record in this cause had not been agreed upon, and that it would be to the best interests of all concerned that the time for filing the record on appeal and docketing the action should be extended,

It is therefore, ordered that the time for filing and docketing the appeal in this cause and the time for filing the record on appeal and docketing the action be and it is hereby extended for forty days from this date, which time is not more than ninety days from the date of the first notice of appeal in this case.

Ordered this the 4th day of April, 1939.

S. C. MIZE,
District Judge.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL AND CROSS APPEAL BY COUNSEL FOR BOTH PARTIES.

278 Filed May 13, 1939.

(Title Omitted.)

The appellant and appellee hereby designate the contents of the record on appeal and cross appeal of this cause to the United States Circuit Court of Appeals as follows, to-wit:

1. Transcript of record from State Court.

2. Motion to withdraw pleadings.

3. Order entered June 3, 1938, permitting withdrawal of pleas theretofore filed.

4. Plea in abatement, filed April 30, 1938.

5. Plaintiff's demurrer to defendant's plea in abatement, filed June 3, 1938.

6. Order sustaining demurrer to plea in abatement.

7. General issue plea and special pleas Nos. 1, 2, 3, 4, 5, 6 and 7, and the demurrers of the plaintiff to special pleas 1, 2, 3, 4, 6 and 7, and replication to defendant's fifth special plea.

8. Order sustaining the plaintiff's demurrers to the defendant's first, second, third, fourth, sixth and seventh special pleas and order overruling the demurrer of the

279 defendant to plaintiff's replication to the defendant's fifth special plea, and order overruling plaintiff's motion for judgment and providing that the defendant answer under the new rule of procedure and providing that the defendant be not required to raise the same points heretofore raised. Said order being dated October 8, 1938, and filed October 11, 1938. Opinion of Court dated August 16, 1938. Opinion of Court dated October 3, 1938.

9. Amendment to paragraph 6 of the declaration filed October 20, 1938.

10. Amendment to declaration and order thereon filed October 24, 1938.

11. Answer of the defendant filed October 20, 1938.

12. The testimony and exhibits in question and answer form, except such exhibits as are eliminated by agreement, herewith filed. There is herewith filed the original and one copy of the transcript of the testimony taken upon the trial of the cause.

13. Opinion of Court dated February 20, 1939.

14. Findings of fact and conclusions of law and judgment dated March 7, 1939, filed March 9, 1939.

15. Motion of the plaintiff to set aside judgment as to damages and to render, filed March 14, 1939.

16. Order overruling motion to set aside the judgment, filed March 14, 1939. Order dated March 13, 1939.

17. Notice of appeal to Circuit Court of Appeals, filed by the defendant March 14, 1939.

280 18. Appeal bond in the penalty of $5,000, filed by the defendant and approved by the United States District Judge on March 16, 1939.

19. Notice of appeal to the Circuit Court of Appeals by the plaintiff, filed March 17, 1939.

20. Cost bond in the penalty of $250.00, filed by the plaintiff on March 13, 1939.

21. Order entered April 4, 1939, extending time for filing and docketing appeal in this cause.

Respectfully submitted,

J. L. BYRD,
Counsel for Defendant and Appellant, Illinois Central Railroad Company.

Jackson, Miss.

C. B. SNOW,
Counsel for Plaintiff and Appellee, Earl Moore.

Jackson, Miss.

---

281 Filed May 13, 1939.

(Title Omitted.)

It is hereby agreed by and between J. L. Byrd, counsel for Illinois Central Railroad Company, defendant in the above styled cause, and C. B. Snow, attorney for Earl Moore, plaintiff in the foregoing styled cause, that in order to shorten the record on appeal to eliminate unnecessary costs as follows, to-wit:

1. There is referred to in the testimony of the plaintiff, Earl Moore, the Supreme Court record, which is a record

of the Supreme Court of the State of Mississippi and a permanent record in the case of Earl Moore vs. Yazoo and Mississippi Valley Railroad Company and Illinois Central Railroad Company, reported in 166 So., page 395, 176 Miss., page 65, and it is agreed that the said transcript of the Supreme Court record show that Earl Moore, the plaintiff in this cause, filed a suit in the Circuit Court of the First District of Hinds County, Mississippi, and that the declaration appears in this record; that the defendant Yazoo and Mississippi Valley Railroad Company and Illinois Central Railroad Company filed several special pleas to said declaration and issue was joined on several of said pleas and the case was heard in so far as plaintiff's testimony was concerned, whereupon a motion for a peremptory instruction was made by the defendant
282 and the motion was sustained and judgment was entered against the plaintiff Earl Moore, all of which appears in the removal record. That said case was appealed to the Supreme Court of Mississippi and there affirmed, and is reported as aforesaid.

2. That Exhibit B to testimony of Earl Moore need not be copied at all, it being agreed that said Exhibit B is Exhibit A to the declaration, and it is further agreed that in copying Exhibit A to the declaration only pages 32 to 41, inclusive, and pages 58 to 59, inclusive, of said exhibit shall be copied in full. It being agreed that said 12 pages contain the contract sued on in this cause and the remaining part of said Exhibit A has no bearing on and does not pertain to the instant case.

3. It is agreed that there need not be copied in the record the transportation rules of the Illinois Central System, Exhibit H to the testimony of plaintiff Moore, but it is agreed that said rules do not provide that the filing of the lawsuit against the railroad company will be sufficient grounds for discharge.

Witness our signatures, this the 13 day of May, 1939.

J. L. BYRD,
Attorney for Appellant.

Jackson, Miss.

C. B. SNOW,
Attorney for Appellee.

Jackson, Miss.

---

283 (Title Omitted.)

It is hereby ordered that the Clerk of this Court be and he is hereby granted thirty (30) days additional time from this date, within which to complete the appeal record in this cause, and to file same in the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisnana.

This the 13th day of May, 1939.

S. C. MIZE,
District Judge.

C. O. B. 1, p. 393.

Filed May 13, 1939.

284. CLERK'S CERTIFICATE.

United States of America,
Southern District of Mississippi.

I, B. L. TODD, JR., Clerk of the District Court of the United States for the Southern District of Mississippi, do hereby certify that the foregoing pages contain a true and correct transcript of the record in the case of Earl Moore, Plaintiff, v. Illinois Central Railroad Company, Defendant, No. 8086 at Law, as the same now remains of record in my office at Jackson, Mississippi.

Witness my hand and seal this June 2nd, 1939.

B. L. TODD, JR.,
Clerk, United States District Court, Southern Dist. of Mississippi,
By E. M. WELLS,
Deputy Clerk.

(Seal)

[fol. 217] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 16th, 1940

No. 9168

ILLINOIS CENTRAL RAILROAD COMPANY

versus

EARL MOORE

(And Reverse Title)

On this day this cause was called, and, after argument by James L. Byrd, Esq., for appellant and cross-appellee, and C. B. Snow, Esq., for appellee and cross-appellant, was submitted to the Court.

[fol. 218] OPINION OF THE COURT AND DISSENTING OPINION OF HOLMES, CIRCUIT JUDGE—Filed June 20, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9168

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant and Cross-Appellee,

versus

EARL MOORE, Appellee and Cross-Appellant

(And Reverse Title)

Appeal and Cross-Appeal from the District Court of the United States for the Southern District of Mississippi

(June 20, 1940)

Before Sibley, Holmes, and McCord, Circuit Judges

SIBLEY, Circuit Judge:

Prior to June, 1926, the appellee Earl Moore was working as a switchman for the Alabama & Vicksburg Railway Company at its yards in Jackson, Miss. He was a member of the Switchmen's Union of North America which had an

agreement with that railway company as to rates of pay, hours of service and working conditions. In June, 1926, [fol. 219] the appellant, Illinois Central Railroad Company, through the Yazoo & Mississippi Valley R. R. Co., took over the operation of the Alabama & Vicksburg Railway Company, expressly assuming performance of said union contract. A consolidation of switching yards at Jackson led in November, 1926, to the making of a new seniority roster of switchmen in the consolidated yards. Moore's number was moved from 37 to 52. He worked in the yard under this number for some time, being in consequence sometimes idle, and then brought a suit in October, 1932, for damages because of the partial unemployment, asserting that his employment was with reference to his old Switchmen's Union contract. He lost his case in the Supreme Court of Mississippi on March 16, 1936, that court saying: "The effect of the promulgation of this November, 1926, seniority roster was to offer the appellant and the other switchmen affected a new contract in so far as their relative seniority was concerned; and where the breach of a contract is followed by the offer of another as a substitute therefor, the acceptance thereof waives the breach of the former. By accepting work under the new roster without protest the Illinois Central was justified in believing that the appellant would claim only thereunder and that it could safely deal with its other switchmen on that assumption and accord to them their rights thereunder." Moore vs. Yazoo & Miss. Valley R. R. Co., 176 Miss. 65, 166 So. 395.

Meanwhile, on Feb. 15, 1933, Moore, having been absent from work for a year on sick leave, reported for work and was discharged as "an unsatisfactory employe." On his request he was given a hearing before the Superintendent, in which his slowness and irregularity of working, and his having sued the Company were brought up. The latter was found in the trial of this case to have been the real cause of [fol. 220] the discharge. Moore appealed to the General Manager, but did not attend at the time and place set for hearing.

On Sept. 25, 1936, Moore sued the Illinois Central Railroad Company in a court of Mississippi for damages for his discharge, alleging that at the time of his discharge he was a member of the Brotherhood of Railroad Trainmen which since 1924 had an agreement in force with that Company touching rates of pay and other things, including

seniority, material portions of which were exhibited, along with the seniority roster of November, 1926, above mentioned, on which he was number 52. He alleged that he "was entitled to work under said contract of employment whenever work was available for 52 men in the Jackson yards and said contract provides, among other things, that no person should be fired or discharged without just cause"; and that he was discharged arbitrarily and without just cause. Six special pleas were filed and held good on demurrer, but on appeal to the Supreme Court of Mississippi the judgment was reversed and the cause remanded for further proceedings. Moore vs. Illinois Cent. R. R. Co., 180 Miss. 276, 176 So. 593. Moore then amended to claim damages in excess of $3,000, and the cause was removed to the district court of the United States. By that court's permission the six pleas were withdrawn and a so-called plea in abatement filed. It set up that the Illinois Central Railroad Company is a common carrier in interstate commerce whose railroad extends from Chicago in Illinois to New Orleans in Louisiana, passing through Mississippi and other States; and that it and Moore as its switchman were subject to the Acts of Congress, especially that of May 20, 1926, amended June 21, 1934, 45 U. S. C. A. § 151 and ff; that the Union contract relied on exists under said laws, and said contract and laws require adjustment of disputes thereunder by the Company's higher officers, and then by the Ad-
[fol. 221] justment Board, which remedies have not been pursued, because of which the suit should be abated. This plea was stricken on demurrer. Six pleas substantially like those withdrawn were then filed, and a seventh setting up that the Union contract was by its terms terminable on thirty days' notice in writing and that Moore's written notice of discharge was in any view effective after thirty days. These pleas and an answer were disposed of adversely by demurrer, or by trial before the court without a jury, and judgment was entered for $4,183.20. This appeal results, with a cross-appeal which claims larger damages.

The district judge in all his important rulings of law considered himself bound by the decisions of the Supreme Court of Mississippi in this and other cases, under the authority of Erie vs. Tompkins, 304 U. S. 64.

We are impressed with the seriousness of the question as to what law determines the validity and meaning of railroad

union contracts, and the remedies applicable to them; and of the practical consequences of the holding that for so long a period as six years a discharged employee may sit quiet without the pursuit of the special remedies in the contract or under the Acts of Congress, and then by suit recover back pay for that time, when perhaps proof may have become difficult touching the merits of his discharge.

We are of opinion that the doctrine of Erie vs. Tompkins applies only to local matters governed wholly by State law. A railroad union contract applying over a railroad system which operates in many States is not such. Its meaning and effect ought to be the same in each State. The present contract was signed by a representative of the Union residing in Chicago and by the General Manager of the railroad whose headquarters are in Chicago. Nothing appears to localize it in Mississippi. Its subject matter, the relationship of an interstate railroad with its employees, is well [fol. 222] within the commerce power of Congress and has for fifty years been a subject of federal legislation.*

The very matter of collective agreements was taken over and extensively regulated and remedies for disputes provided by the Railroad Labor Act of 1926, amended in 1934. Section 2 of the Act, 45 U. S. C. A. 151-a, names as one of its purposes: "(5) To provide for the *prompt* and orderly settlement of *all disputes* growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." In stating the duties of carriers and employees, 45 U. S. C. A. §152(1), it requires them to exert effort "to make and maintain such agreements", and that "all disputes between a carrier and its or their employees shall be considered, and

---

* Contracts of railroad employment were regulated by the Act of June 1, 1898, 30 Stat. 424, but the Act was held unconstitutional, Adair vs. U. S., 208 U. S. 161. It was repealed and substituted by the Act of July 15, 1913, 45 U. S. C. A. §§ 101-125. "Controversies concerning wages, hours of labor or conditions of employment" were dealt with; and agreements were to be sought by mediation and arbitration. Hearing by representatives of employees was provided in federal receiverships, Sect. 9. Hours of labor were regulated in 1907. 45 U. S. C. A. § 62. The Act of Feb. 28, 1920, 45 U. S. C. A. §§ 131-146, again dealt with such controveries and encouraged the making of agreements thereabout.

if possible decided, with all expedition, in conferences between representatives designated and authorized so to confer * * *." Three lengthy paragraphs relating to the choice of representatives, the making of collective bargains, the deduction of union dues, and to agreements not to join a union, are expressly written into every contract of employment. 45 U. S. C. A. §152(3) (4) (5) (8). Subparagraph (7) prohibits changes in the rates of pay, rules or working conditions of employees as a class, as embodied in the agreement, except as provided by the agreement or the statute. Section 3, 45 U. S. C. A. §153, provides jurisdiction in the Railroad Adjustment Board for all manner of disputes, the First Division being expressly given jurisdiction over those involving yard-service employees. Sub-[fol. 223] section (i) makes it plain that not only disputes raised by the Union but also those of a single employee are included, saying: "The disputes between *an employee* or group of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted June 21, 1934, *shall be handled* in the usual manner up to and including the *chief operating officer* of the carrier", and then may be *referred* to the Adjustment Board. Awards are final except as to a money award; Subsection (m) (o). Awards, including money awards, are enforcible in the district court: Subsection (p). This legislation was explained and vindicated as respects the forming of collective agreements in Texas and New Orleans R. R. Co. vs. Brotherhood, 281 U. S. 548, and Virginia Railway Co. vs. System Federation No. 40, 300 U. S. 515.

A collective agreement between the employees of an interstate carrier by rail and their employer is therefore not a local matter as to whose nature and application the decisions of a State Supreme Court are binding on the federal courts. On the contrary, because of the subject matter, and of the federal legislation touching it, a federal court is bound to exercise an independent judgment, and the Supreme Court of the United States has final authority. The decisions of the Supreme Court of Mississippi are entitled to the same respectful consideration as are those of the courts of other States, but no more.

The decision of the Mississippi court in this very controversy is not conclusive of it. As in the case of Wichita

Royalty Co. vs. City National Bank, 306 U. S. 103, the decision was one of reversal, and not a final adjudication; and the Mississippi court does not regard itself as bound upon a second appeal, if satisfied it decided the law wrongly on the first. Brewer vs. Browning, 115 Miss. 358, 76 So. 267. [fol. 224] Since the removal of the case to the federal court this court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration. If the matter were only one of Mississippi law we might well abide that court's latest expression, but because it involves the interpretation and application of a collective contract of railroad employees we should re-examine the law.

We are unable to agree that a single employee suing on his contract of employment to enforce his individual right to recover pay or for damages for discharge sues directly upon the collective agreement as a complete contract made for his benefit. See Yazoo & Miss. Valley Ry. Co. vs. Sideboard, 161 Miss. 4, 133 So. 669. The federal statutes above referred to speak of the collective agreement as an "agreement concerning rates of pay, rules, and working conditions", (45 U. S. C. A. §152(1) (6), and often), but the individual's contract is referred to as "the contract of employment between the carrier and each employee." (45 U. S. C. A. § 152(8)). The collective agreement may contain a contract between the union and the carrier, as for an open or closed shop, collection of union dues,* and the like, but it is not itself a contract of employment. It binds no one to serve the carrier and binds the carrier to hire no particular person. It is only a basis agreed upon as mutually satisfactory for making contracts of employment. The contracts of employment arise when individual men present themselves, are examined touching their knowledge of the railroad rules and other things, and stand the required physical examinations, and are severally accepted as employees. Or they arise tacitly when old employees, after the publication of the collective agreement, continue to work. In the absence [fol. 225] of any special agreement otherwise, every employment may be presumed to be on the basis of the collective agreement and to adopt its terms. But ordinarily

---

*At present the federal law prohibits such a contract in railroad collective agreements.

there is nothing to prevent a special agreement if an employee desires it. The collective agreement before us concludes: "Nothing in these rules shall be construed to abrogate any local rights the men may now have", showing that its application might vary. When the collective agreement, tacitly or expressly, is taken as supplying any or all of the terms of the service of a particular employee, it still is not the contract, but only a standard to which the parties have referred in making their parol contract. Such is the view deliberately adopted by this court in a case where a single employee was asserting a right to the pay fixed in the collective agreement, where we held the employee, though not a member of the Union which made the agreement, was employed under its terms. Yazoo & Miss. Val. Ry. Co. vs. Webb, 64 Fed. (2) 902. A similar view is maintained both in Kentucky and in Tennessee, where the contract before us also operates. Hudson vs. Cin. Ry. Co., 152 Ky. 711, 154 S. W. 47; Cross Mountain Coal Co. vs. Ault, — Tenn. —; 9 S. W. (2) 692. A recent well considered case in which all the authorities are reviewed is Rentschler vs. Missouri Pac. R. R. Co., 126 Neb. 493, 95 A. L. R. 1. In it the Webb case was cited with approval and its holdings adopted. See also Gary vs. Central of Ga. Ry., 37 Ga. App. 744, 44 Ga. App. 120, 123. The collective agreement as such is made, defended and changed by the union, but the rights of each employee employed under it are his own, and he may waive or assert them himself as he sees fit. Piercy vs. L. & N. R. R. Co., 198 Ky. 477, 248 S. W. 1042.*

[fol. 226] It follows clearly that when an individual employee sues for damages for a breach of his contract of employment because of a discharge contrary to the collective agreement as Moore does; or because he was not paid the

---

* On an appeal from Canada the English Privy Council held the collective agreement to be no contract between the individual and his employer, and to be enforceable only by the union and by means of a strike, the individual having no right of action on it. Young vs. Canadian Northern Ry., 38 Manitoba L. R. 485, 567. — A. C. —. This decision was followed in Kessel vs. Great Northern Ry. Co., 51 Fed. (2) 304. See also Bancroft vs. Canadian Pac. R. R. Co., 30 Manitoba L. R. 401.

wages fixed in the collective agreement, as Webb did, (Yazoo & Miss. Valley R. R. Co. vs. Webb, supra), he is not suing on the written collective agreement, but upon his parol contract of hiring, which adopted those terms of the collective agreement which are applicable to him. Moore's contract of employment in 1933 would not be established by merely proving this written collective agreement made in 1924 by a union to which he did not belong and with a railroad for which he did not work. He was then working for another railroad, which had another collective agreement under which he continued to claim rights until the adverse decision in March, 1936. To establish the contract of employment which he now claims, Moore must show that he became an employee of the Illinois Central Railroad Company under circumstances which made the terms of the Brotherhood's collective agreement applicable to him. Perhaps he would have to show his acceptance of the Brotherhood's seniority roster of November, 1926, since it was that act which ended his employment with reference to the contract between the Switchmen's Union and the Alabama & Vicksburg Ry. Co., as held by the Supreme Court of Mississippi. Moore vs. Yazoo & Miss. Valley Ry. Co., 176 Miss. 65, 166 So. 395.

His contract of employment standing thus, and no federal statute providing any limitation, we think the pleaded State statute of three years may apply: "Actions on an open account, or stated account, not acknowledged in writing and signed by the debtor, and *on any unwritten contract, express or implied,* shall be commenced within three years next after the cause of such action accrued and not after." Mississippi Code, Sect. 2299. It is well settled that a con- [fol. 227] tract is unwritten if the contract itself cannot be proven wholly by writings. 37 C. J., Limitations, § 86. "If there is any break in the chain of writings and such break has to be supplied by parol testimony, then the three years' statute applies and not the six years' * * * Any break in the writing or writings which is material and provable by parol brings the three years' statute into operation." City of Hattiesburg vs. Cobb Bros., — Miss. —, 163 So. 676. It is not apparent from the petition that Moore's contract of employment is wholly provable in writing, and the plea of the three year statute should not have been stricken on demurrer.

In the event writings do exist which bring the case within the six year statute of limitation, the other defenses will

become material. We consider them briefly. The plea that suit may not be filed without recourse to the Adjustment Board is without merit. The Adjustment Board may settle the disputes of the individual employee as well as those of the group, 45 U. S. C. A. § 153 (i); as may the Mediation Board, 45 U. S. C. A. § 155 (1). The first cited section says that a dispute "shall be handled in the usual manner up to and including the chief operating officer of the carrier," and then it "may be referred" to the Adjustment Board. The permission to go to the Adjustment Board does not exclude direct recourse to the courts.

The provision in the collective agreement for a hearing before the carrier's officers, with appeal to the highest, is in line with the requirements of the statute, but neither it nor the statute intends to make the employer's adverse decision binding on the employee. The requirement that relief be sought up through the highest operating officer seems to be a prerequisite to an appeal to the Adjustment Board, but not to a suit in court.

[fol. 228] The conductors' collective agreement in McGlohn vs. Gulf & S. I. R. Co., 179 Miss. 396, 174 So. 250, expressly specified that conductors would "not be demerited, disciplined, or discharged without just cause", and provided for notice and trial before discharge. The agreement before us provides only that yardmen taken out of service for cause shall be notified of the reason and given a hearing within five days if demanded, with right of appeal. "In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost." It is argued with force that since the employment is for no definite time, and the employee may quit at any time, the employer may discharge him at any time; and that to cut off the right to discharge at will a clear stipulation is required, like that in the McGlohn case. The contract before us contains only a stipulation that the cause of discharge shall be stated and a hearing given on demand, and if "found to be unjust, yardmen and switchtenders shall be reinstated and paid for all time lost." We find in these provisions a clear implication that discharge is not to be at the employer's will, but only for a just cause, and it would be unreasonable, without express provision to that effect, to hold that the railroad officers are the sole or the final judges of the justice of the cause. Nor is appeal to the highest operating officer for reinstatement made a pre-

requisite to an appeal to the court for damages. Surely a court, enlightened by witnesses, may judge of the justice of a cause of discharge. In case of an arbitrary discharge the union might take the matter to the management, the Adjustment Board, or even to the test of a strike. The individual also on his individual contract of employment may seek reinstatement with pay through the railroad's officers, or through the Adjustment Board; or he may, before or after [fol. 229] pursuing those remedies, acquiesce in the discharge and ask damages for a breach of contract in a court of law.

The filing by an employee, on advice of counsel, of a suit to establish his seniority status is not by itself a just cause to discharge him. The seniority provision of a collective agreement is an important and valuable part of the individual contracts of employment made thereunder. It has been held the union cannot waive or destroy it. Piercy vs. L. & N. R. R. Co., 198 Ky. 477, 248 S. W. 1042. If the employee's seniority is not satisfactorily settled otherwise, we see no reason why an apeal to a court to establish his right, if decently conducted, should forfeit his employment. If the railroad wishes to retain no one who sues it, a stipulation to that effect ought to be added to the provisions about unjust discharge. The rule about discharging those who sue claimed to exist on the Illinois Central is shown to be only a policy, and not known to Moore. It does not warrant a court in saying that Moore's seniority suit was a just cause for discharge. Whether it was the true cause, or whether another sufficient cause was acted on, we leave open for retrial.

The provision of the collective agreement that "These rules and rates shall remain in effect until Dec. 31, 1925, and thereafter until revised or abrogated, of which intention thirty days written notice shall be given", refers to the collective agreement as a whole, and the notice contemplated is one between the railroad and the union. It does not mean that by a written notice to an employee his contract can be ended without just cause after thirty days. We so held in Yazoo & Miss. Valley R. R. Co. vs. Webb, 64 Fed. (2) 902. The plea that the discharge thus became operative after thirty days was properly stricken.

The judgment against Moore in his seniority suit is not res judicata in this suit. The effect of a State court's judg- [fol. 230] ment as res judicata has always been held a ques-

tion of State law; and the holding of the Supreme Court of Mississippi in this case, 180 Miss. 276, 176 So. 593, is on that point conclusive. This suit is upon a contract of employment with the Illinois Central Railroad Company, which embraces terms of the Brotherhood's agreement. That suit was upon a contract of employment with the Alabama & Vicksburg Ry. Co., which embraced terms of the Switchmen's Union agreement, and which was assumed by the Yazoo & Miss. Valley R. R. Co. Moore lost his former suit solely because it was held his old employment had been superseded by that on which he now sues. The causes of action are not the same.

On the cross-appeal, we do not think that the earnings of the man next below Moore on the seniority roster measure Moore's damages. Moore was not a regular worker before his discharge, and it was proper to consider this in estimating his losses due to discharge.

The judgment is reversed because of error in striking the plea of three years' limitation, and the cause is remanded for further proceedings not inconsistent with this opinion.

HOLMES, Circuit Judge, dissenting:

This is a suit for damages for breach of a contract made for the benefit of a specific class of persons which included the plaintiff. The contract of employment between the plaintiff and the railroad company was made in Mississippi, was to be performed in Mississippi, and was therein ac- [fol. 231] tually performed until the date of his alleged wrongful discharge in the same state.

There is no federal question in this case, except as to matters of defense. Our jurisdiction rests solely upon diversity of citizenship. This action was originally instituted in a state court of Mississippi for damages in the sum of $3,000. It went to the Supreme Court of that state, which, reversing the trial court, held that the six-year statute of limitations applied and that the action was not barred. Moore v. Illinois Central R. Co., 180 Miss. 276, 176 So. 593. After it was remanded for retrial, and after the plaintiff had amended so as to claim more than $3,000, the case was removed to a federal court on the ground of diversity of citizenship. There is no federal statute of limitations involved here; only state statutes.

I cannot reconcile with Erie Railroad v. Tompkins, 304 U. S. 64, the majority opinion wherein it urges uniformity of construction of a contract, operating in many states, as a basis of federal courts exercising an independent judgment. This argument, in one aspect, seems to be in accord with the view of the Supreme Court of Mississippi to the effect that this suit is upon a written contract. Later, however, the opinion holds that the written contract was merely adopted by the employee, either orally or impliedly when he went to work, and, therefore, that the three-year statute applies.

Upon the facts before us, the federal court is not authorized to exercise an independent judgment, either as to the construction of the contract sued on or as to the applicable statute of limitations. Both are questions of state law, and we should follow the state court. The highest court of Mississippi has held that the action is not barred, and I think we are bound by its decision, since it does not appear that the state court has altered its opinion. Wichita Co. [fol. 232] v. State Bank, 306 U. S. 103, 107.

For the reasons indicated, I dissent from the judgment of reversal.

[fol. 233] Extract from the Minutes of June 20th, 1940

No. 9168

ILLINOIS CENTRAL RAILROAD COMPANY

versus

EARL MOORE

(and reverse title)

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed because of error in striking the plea of three years'

limitation; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee and cross-appellant, Earl Moore, and the sureties on the cross-appeal bond herein, James Burns and D. L. Lacey, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Holmes, Circuit Judge, dissents."

BLANK PAGE

[fols. 234-239] PETITION FOR REHEARING—Filed July 11, 1940

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 9168.

ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT AND CROSS-APPELLEE,

VS.

EARL MOORE, APPELLEE AND CROSS-APPELLANT.

PETITION FOR A REHEARING.

The opinion of this Court was rendered on June 20, 1940, reversing judgment of the District Court of the United States for the Jackson Division of the Southern District of Mississippi in favor of Appellee and against Appellant. Appellee respectfully petitions a rehearing and in support thereof assigns as follows:

1. The Rules of this Court, in specifying what each brief shall contain, provide, Rule 24, Section 2, sub-section (b):

> "A specification of the errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. Errors not speci-

fied according to this rule will be disregarded, but the Court, at its option, may notice a plain error not specified."

The Court in its opinion in this case affirmed the District Court on every ruling assigned as error and on every point presented, but "The judgment is reversed because of error in striking the plea of three years limitation."

The plea of limitation is Appellant's Special Plea No. 6 (Tr. pg. 75-76). Appellee demurred to this special plea, and the demurrer was sustained.

Appellant's Specification of Errors relied on is found in its original brief, at page 9 thereof. The action of the District Court in sustaining the demurrer to said Special Plea No. 6, the plea of three years limitation, is not assigned as error.

Said Special Plea No. 6 is not mentioned in Appellant's brief, except that at page 38 of the original brief Appellant concedes that the demurrer to said Special Plea No. 6, along with demurrers to other pleas, was properly sustained.

Naturally, since the action of the District Court in striking this plea was not specified as error by the Appellant, and since the propriety of so doing was specifically conceded by Appellant, the question was in no manner presented by Appellee. On this question Appellee has not had his day in court.

We do not conceive that this question, going to the very heart of this lawsuit, can be termed "a plain error" such as the Rule of the Court referred to excepts from the rule itself that errors not specified will be disregarded.

We most respectfully submit that this cause should not have been reversed on a ruling not assigned as error

by Appellant; not urged by Appellant, but on the other hand the correctness of the ruling of the lower court confessed and conceded by Appellant.

The plea in question is a plea of a statute of limitations. Appellant's actions in regard to the ruling of the District Court in sustaining the demurrer thereto constitutes in effect a waiver of said plea.

2. THE SIX YEAR STATUTE OF LIMITATIONS AND NOT THE THREE YEARS STATUTE APPLIES.

It is the Mississippi Statute of Limitations which is involved in this lawsuit. It is the Mississippi Statute of Limitations invoked in Appellant's Special Plea No. 6—Section 2299, Code of Mississippi of 1930. This section of the Mississippi law fixes the period of limitations on actions on unwritten contracts at three years. Section 2292 of this same Code fixes the period of limitations in other actions, including actions on written contracts, at six years. Without these Mississippi statutes there would be no period of limitation on this action. There is no period of limitation fixed thereon by the Federal Law.

We submit that if a statute of limitation of a state is invoked, the same is invoked as construed by the decisions of the highest court of such state.

> "State statutes of limitation, as construed by the state courts, should be applied in actions at law in a Federal Court where they are applicable * * *."
> 25 C. J. 849 and authorities cited.

And again:

> "Where a state statute of limitations has been

construed by the highest court of the state as not applying to existing causes of action, the same construction of the same statute will be adopted by Federal Courts, if not in conflict with the paramount authority of the Constitution or laws of the United States or with the fundamental principles of justice and common right,"
37 C. J. 697.

The case of *Murray* v. *Gibson*, 15 How. (U.S.) 421, 14 L.Ed. 755, cited as authority for this text, is a case involving a Mississippi Statute of Limitations, and we submit is in point here.

The Supreme Court of the State of Mississippi, in two fully considered opinions, has held that a suit of the character involved here is a suit on a written contract; a suit for damages for breach of a contract made for the benefit of a class of persons.

Gulf & Ship Island R. R. v. *McGlohn*, 183 Miss. 465, 184 Sou. 71; same case 179 Miss. 396, 174 Sou. 250; and Y. & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 Sou. 669.

In this identical case, *Moore* v. *Ill. Cent. R. R.*, 180 Miss. 276, 176 Sou. 595, the Mississippi Court held that, of the two Mississippi Statutes of Limitation, this was an action in which the Mississippi three year statute was *not* applicable but the Mississippi six year statute was applicable.

This Court in its opinion concedes that the effect of a state court's judgment as res judicata "has always been held a question of state law; and the holding of the Supreme Court of Mississippi in this case, 180 Miss. 276, 176 Sou. 593, is on that point conclusive."

We submit that a stronger rule applies where there is involved a state court's holding on its own statute of limitations which has been invoked.

This is not a matter governed by the Federal Constitution or by acts of Congress. The Supreme Courts in *Erie R. R. Co.* v. *Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, has said that except in matters so governed the Federal Court sitting in a state should follow the law of such state whether so declared by its Legislature or its highest court.

It has always been the law that a Federal Court in applying the statute law of a state should apply the same as construed by such state.

Here the Mississippi Court has spoken definitely in this case with reference to the application of its own statutes. It followed two of its own previous decisions. It has not modified, altered, or amended its opinion. It has held its six year statute is applicable and its three year statute is not applicable. We submit, under the Erie R. R. case and *Wichita Royalty Co.* v. *Bank,* 306 U.S. 103, 83 L.Ed. 515, the Mississippi Court ought to be followed.

Here we have a situation typical of the kind the Supreme Court was endeavoring to prevent in the Erie Railroad Company case. If the Illinois Central Railroad Company was a Mississippi corporation, it could not have removed this cause to the Federal Court, and the Mississippi Court has already said Moore's suit is not barred by the Mississippi three year statute and he could maintain his action, but when he gets over in the Federal Court that Court holds that the Mississippi Court is wrong in the application of its own statute and that the suit is barred thereby and cannot be maintained.

The Yazoo & Mississippi Valley Railroad Company is a railroad company in the State of Mississippi doing an interstate business. It so happens that it is incorporated under the laws of the State of Mississippi. If a suit where the identical question is involved is filed against the Yazoo & Mississippi Valley Railroad Company the same could, of course, not be removed to the Federal Court. In such a suit the three year statute of limitations would not apply, while in this case, if the present judgment stands, Moore's suit is barred by the three year statute, a statute of the State of Mississippi, which in the identical case before the Supreme Court of this state is not barred.

This kind of a situation just isn't right.

WHEREFORE, Appellant prays that a rehearing be granted and that the judgment of the District Court be affirmed.

GEO. BUTLER,
C. B. SNOW,
Attorneys for Appellee.

I, C. B. SNOW, of Counsel for Appellee, do hereby certify that this petition for rehearing is not filed for delay, but in my opinion the same is well taken and should be granted, and the opinion of the District Court should be affirmed.

I further certify that I have this day handed to Hon. J. L. Byrd, Attorney of record for Appellant, a true copy of this petition for rehearing.

This the _____ day of July, 1940.

_____
Of Counsel for Appellee.

[fol. 240] ORDER DENYING REHEARING

Extract from the Minutes of August 8, 1940

No. 9168

ILLINOIS CENTRAL RAILROAD COMPANY

versus

EARL MOORE

(And Reverse Title)

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 241] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 217 to 240 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9168, wherein Illinois Central Railroad Company is appellant and cross-appellee, and Earl Moore is appellee and cross-appellant, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 216 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of December, A. D. 1940.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit, by E. V. Vendling, Deputy Clerk. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

BLANK PAGE

[fol. 242] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 16, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.